Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

EMPLOYERS INSURANCE COMPANY OF WAUSAU,
Petitioner,

v.

JOHNSON CONTROLS, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an appellate court departs from fundamental principles of due process when it *sua sponte* decides an issue—overruling its prior precedent—when that issue was not among the matters presented to the court for review, the issue was neither briefed nor argued by the parties, and the court gave the parties neither notice that it intended to resolve the issue nor opportunity to be heard on the matter before the court's decision.

PARTIES TO THE PROCEEDING

Petitioner, which was a defendant in the trial court and respondent in the Wisconsin Supreme Court, is Employers Insurance Company of Wausau, formerly known as Employers Insurance of Wausau A Mutual Company.

Respondent Johnson Controls, Inc., was plaintiff in the trial court and petitioner in the Wisconsin Supreme Court.

In addition, the following parties were defendants in the trial court: Affiliated FM Insurance Company, AIU Insurance Company, Allstate Insurance Company (as successor to Northbrook Excess and Surplus Insurance Company), American Employers' Insurance Company, American Home Assurance Company, American Motorists Insurance Company, Central National Insurance Company of Omaha, Employers Mutual Casualty Company, Employers Reinsurance Corporation, Federal Insurance Company, First State Insurance Company, Granite State Insurance Company, Highlands Insurance Company, Landmark Insurance Company, London Market (certain underwriters at Lloyd's London and London Market Insurance Companies), National Union Fire Insurance Company of Pittsburgh, PA, Northbrook Excess and Surplus Insurance Company (as predecessor to Allstate Insurance Company), Puritan Insurance Company (f/n/a Manhattan Fire and Marine Insurance Company), Stonewall Insurance Company, Transamerica Premier Insurance Company, Travelers Indemnity Company, United National Insurance Company, Zurich Insurance Company, International Insurance Company, Westchester Fire Insurance Company, Allianz Underwriters Insurance Company, American Centennial Insurance Company, American Insurance Company, Associated International Insurance Company, California Union Insurance Company, Continental Insurance Company, Fireman's Fund Insurance Company, Harbor Insurance Company, North Star Reinsurance Corporation, and Republic Insurance Company.

CORPORATE DISCLOSURE STATEMENT

All of the stock in petitioner is owned by Liberty Mutual Group Inc.

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IN THE

Supreme Court of the United States

EMPLOYERS INSURANCE COMPANY OF WAUSAU,
Petitioner,

v.

JOHNSON CONTROLS, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

Petitioner Employers Insurance Company of Wausau respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Wisconsin in this case.

OPINIONS BELOW

The decision of the Supreme Court of Wisconsin (App. 1a-77a) is reported at 665 N.W.2d 257. The decision of the Wisconsin Court of Appeals (App. 79a-91a) is reported at 640 N.W.2d 205. The orders and judgment of the Circuit Court for Milwaukee County (App. 117a-141a) are unreported. Prior decisions of the Circuit Court (App. 109a-116a) and the Court of Appeals (App. 93a-108a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on July 11, 2003. A timely motion for reconsideration (the equivalent of a petition for rehearing under this Court's Rule 13.3) was denied on September 18, 2003. App. 147a. On December 9, 2003, Justice Stevens extended the

time for filing a petition for a writ of certiorari to and including January 16, 2004. On January 12, 2004, Justice Stevens further extended the time for filing a petition for a writ of certiorari to and including February 15, 2004 (the Sunday before Presidents Day, a federal holiday). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

This case presents questions about an appellate court's authority to decide, *sua sponte*, issues that were never briefed to that court and were not relevant to the subject matter of the appeal, without permitting the litigants notice or an opportunity to be heard. After submission of briefs and oral argument in this case, the Wisconsin Supreme Court decided a significant issue of insurance coverage that was never raised in the policyholder's petition for review to the court or briefs on the merits, never identified by the court as an issue of concern to the parties, and never addressed by any lower court. Moreover, in deciding that issue, the court overruled one of its prior holdings, without advising the parties that the issue was open to reexamination or providing an opportunity to address the *stare decisis* concerns raised by doing so.

The Wisconsin Supreme Court's decision—made without giving petitioner notice or an opportunity to be heard—will likely cost petitioner tens of millions of dollars. If a department of motor vehicles had acted in such a manner when revoking a person's driver's license, the courts would have found a plain denial of due process. Appellate courts, however, are bound by the Due Process Clause no less than state licensing agencies. When an appellate court contemplates reaching out to decide an issue not before it that involves

millions of dollars and implicates broad public policy issues, in a context where the reliance interests underlying *stare decisis* are very substantial, the Due Process Clause demands that the court first give the parties an opportunity to be heard.

Undoubtedly there are circumstances in which an appellate court may examine, *sua sponte*, issues necessary to the proper resolution of claims that the parties have put before it. At some point, however, *sua sponte* judicial decisionmaking can breach the banks of the adversary system that is the foundation of the American judicial system. That point was reached in this case, when the Wisconsin Supreme Court reached out to decide a matter that had neither been presented for the court's review nor adjudicated by any lower court.

There is reason to believe that the kind of surprise judicial decisionmaking engaged in by the Wisconsin Supreme Court in this case may be on the rise in appellate courts. Another petition currently before this Court seeks review of a similar action by the Federal Circuit, which has frequently adjudicated complex issues of patent claim construction *sua sponte* on appeal without giving the parties notice or an opportunity to be heard on the question. *See Turn-Key-Tech LLC* v. *National Film Lab., Inc.*, No. 03-1138 (petition for cert. filed Feb. 3, 2004). Commentators have also criticized the practice of *sua sponte* decisionmaking by appellate courts, noting that it conflicts with basic norms of our adversary system of justice and reduces the public's confidence in the judicial system.[1]

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[1] *See* Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look At* Sua Sponte *Decisions By Appellate Courts*, 69 Tenn. L. Rev. 245 (2002); Barry A. Miller, Sua Sponte *Appellate Rulings: When Courts Deprive Litigants Of An Opportunity To Be Heard*, 39 San Diego L. Rev. 1253 (2002); D. Scott Crook, *Affirming the Untested: Affirming A Trial Court Based On Issues Raised* Sua Sponte, Utah Bar J., Oct. 2001, at 10.

Although several decisions of this Court make clear that the Wisconsin Supreme Court's *sua sponte* action in this case cannot stand, this Court has never directly addressed the limits on an appellate court's authority to decide significant, unappealed issues without giving the parties either notice or an opportunity to defend their interests. This case presents a vehicle for the Court to clarify reasonable constitutional limits on the power of appellate courts to decide issues *sua sponte*. Without correction by this Court, the abuses of *sua sponte* decisionmaking will persist unchecked, destined to remain the subject of dissenting opinions.

STATEMENT OF THE CASE

1. *The Insurance-Coverage Background of this Dispute*

Respondent Johnson Controls, Inc. ("JCI") manufactured and sold automotive lead acid batteries and industrial controls. As a result of the release of pollutants into the environment during JCI's manufacturing processes and waste disposal activities, numerous governmental and private-party claims have been made against it under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, and related state statutes. This case arises out of a dispute between JCI and its insurers over insurance coverage for those environmental claims.

In November 1989, JCI filed this suit against petitioner Employers Insurance Company of Wausau ("Wausau") and more than 30 of JCI's other insurance carriers in Milwaukee County Circuit Court. JCI's lawsuit concerns two distinct obligations of an insurer under a standard general liability insurance policy. First, the indemnity obligation requires the insurer to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay *as damages* because of . . . property damage to which this policy applies, caused by an occurrence." Second, under the insurer's separate defense obligation, the insurer has "the right and duty to defend *any suit* against the insured seeking damages on

account of such . . . property damage." App. 15a (emphasis added).[2]

In the context of environmental claims, these two obligations have, in turn, generated two separate legal issues. The first issue, under the indemnity obligation, is whether the insured's liability under CERCLA for costs of assessing and remediating property contaminated by hazardous substances constitutes "damages." The second issue, under the defense obligation, is whether a letter to the insured from a governmental agency, such as the Environmental Protection Agency ("EPA"), identifying the insured as a "potentially responsible party" ("PRP") under CERCLA constitutes a "suit" against the insured, even though no formal judicial proceedings are instituted.[3] The resolution of both issues may expose the insurer to substantial financial obligation, but the exposure in connection with the defense of "suit" issue may be much greater, because, unlike the indemnity obligation, the defense obligation is typically not limited by any policy limits.[4]

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[2] An insurer's duty to defend a lawsuit against its insured is separate and distinct from its duty to indemnify its insured. *See* 14 Lee R. Russ, *Couch on Insurance* § 200:3 (3d ed. 2000).

[3] Under CERCLA, the federal government has two alternative means for cleaning up contaminated property: EPA may clean up the property and then seek recovery of response costs from other parties, or EPA may seek an administrative or judicial order compelling another party to undertake (and pay for) response actions. *See* 42 U.S.C. §§ 9604, 9607(a). In either event, the EPA typically seeks to identify and notify any PRPs before selecting a response action, in order to achieve a negotiated disposition. *See* 42 U.S.C. §§ 9613(k)(2)(D), 9622(e).

[4] Several state supreme courts have addressed the "suit" issue and the "damages" issue in separate cases, reflecting the fact they are independent legal issues. *Compare Lapham-Hickey Steel Corp.* v. *Protection Mut. Ins. Co.*, 655 N.E.2d 842 (Ill. 1995) (addressing the "suit" issue), *with Outboard Marine Corp.* v. *Liberty Mut. Ins. Co.*, 607 N.E.2d 1204 (Ill. 1992) (addressing the "damages" issue); and *compare Minnesota Mining & Mfg. Co.* v. *Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990) ("damages" issue), *with SCSC Corp.* v. *Allied Mut. Ins. Co.*, 536 N.W.2d 305

The Wisconsin Supreme Court addressed both the "suit" and "damages" issues in *City of Edgerton* v. *General Casualty Co.*, 517 N.W.2d 463 (Wis. 1994), while this case was still pending in the circuit court. First, *Edgerton* held that a PRP letter to a policyholder does not constitute a "suit" triggering the insurer's defense obligation, because "the primary attribute of a 'suit' is that parties to an action are involved in actual court proceedings, initiated by the filing of a complaint." *Id.* at 474-475. Second, *Edgerton* held that CERCLA response costs do not constitute "damages" within the insurer's indemnity obligation. Response costs under CERCLA, the court reasoned, are not designed to compensate for past wrongs, but are instead in the nature of equitable relief, intended to prevent future contamination by means of injunctive action. *Id.* at 478.

The Wisconsin Supreme Court again addressed the "damages" issue in *General Casualty Co.* v. *Hills*, 561 N.W.2d 718 (1997). *Hills* held that a private party's lawsuit against an insured seeking environmental response costs did seek "damages," where (unlike *Edgerton*) the insured had not previously received a governmental directive or order under CERCLA directing it to address the contamination. *Id.* at 724-725. Chief Justice Abrahamson, in a concurring opinion, characterized the court's distinction of the facts of *Hills* from those in *Edgerton* as "debatable." *Id.* at 726.

Over the next five years, the Wisconsin appellate courts endeavored to apply the "damages" holdings of *Edgerton* and *Hills* to environmental coverage claims in various factual scenarios. Eventually, the Wisconsin Court of Appeals, in this case, synthesized the "damages" case law by establishing four categories of underlying environmental claims. Three of the categories under this framework were considered claims for "damages"; the remaining category (denomi-

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(Minn. 1995) ("suit" issue); *see also Michigan Millers Mut. Ins. Co.* v. *Bronson Plating Co.*, 519 N.W.2d 864 (Mich. 1994) ("suit" issue), *overruled in part by Wilkie* v. *Auto-Owners Ins. Co.*, 664 N.W.2d 776 (Mich. 2003).

nated by the court of appeals as "Category 2") was not. App. 82a-84a. The court commented that, although the distinctions among the categories were based on a logical application of *Edgerton* and *Hills*, they might seem "arbitrary . . . to some." App. 87a-88a.

By contrast, there is no indication that the Wisconsin courts had any difficulty applying *Edgerton*'s bright-line rule on the "suit" issue: a complaint filed in court commences a "suit," but a PRP letter does not. Nor, before this case, did the Wisconsin Supreme Court suggest that it might be willing to reconsider its "suit" ruling.

2. *Proceedings in this Case in the Wisconsin Courts*

Shortly after *Edgerton* was decided, Wausau moved for summary judgment in this case against JCI. The circuit court held that the underlying claims against JCI did not constitute "damages" and therefore concluded that Wausau was entitled to summary judgment. App. 114a-115a. The circuit court did not address the "suit" issue at all, because its ruling on the "damages" issue disposed of all claims.[5]

Consistent with the circuit court's judgment, JCI's appeal to the Wisconsin Court of Appeals did not raise the "suit" issue. JCI's appellate brief identified three issues, each pertaining only to the "damages" issue. In disposing of JCI's appeal, the court of appeals focused only on the "dam-

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[5] Under the insurance policy at issue, an insurer has a duty to defend a "suit" only if the suit is one "seeking damages." App. 15a. Thus, if (as the Wisconsin Supreme Court held in *Edgerton*), environmental response costs are by definition not "damages," then any action against the insured demanding response costs, whether by way of PRP letter or lawsuit, by definition cannot be a suit "seeking damages," regardless of the meaning of "suit." On the other hand, even if environmental response costs *are* considered damages, it does not follow that any action against the insured demanding response costs is a "suit seeking damages" within an insurer's defense obligation. A complaint filed in court seeking recovery of response costs would be a "suit . . . seeking damages," but a PRP letter would not, because, while it might seek "damages," it would not be a "suit."

ages" issue and announced the four-category "damages" framework discussed above. As it was unclear to the court of appeals whether the circuit court's rulings with respect to the multiple insurer-defendants were in accord with the "damages" framework it had announced, the court of appeals vacated the circuit court's judgments and remanded for entry of a single global judgment. App. 97a, 108a.

On remand, the circuit court entered a global judgment, ruling that all of JCI's claims fell into a category other than Category 2 and thus were not claims for "damages." Once again, the circuit court did not address the "suit" issue. App. 123a-141a. JCI again appealed to the Wisconsin Court of Appeals. JCI's brief raised only one issue for appeal: whether the circuit court had properly applied the four-category "damages" framework to JCI's claims. Again, JCI's brief made no mention of the "suit" issue, as it had not been addressed by the circuit court. The court of appeals reaffirmed its four-category "damages" analysis and also upheld the circuit court's application of that framework to each underlying claim. App. 82a-84a, 91a.

JCI then filed a petition for review in the Wisconsin Supreme Court. As with each of its prior appellate filings, none of the four issues presented in the petition raised the "suit" issue. The first three issues challenged the four-category framework and its application by the circuit court. The fourth question presented was: "Should [*Edgerton*] be overruled in light of the 'arbitrary' and 'debatable' distinctions it has produced and the discrediting of authorities upon which it relied?" App. 149a-150a. This fourth question was necessarily limited to *Edgerton*'s ruling on the "damages" issue, because only that holding had ever been identified as having produced "arbitrary" and "debatable" distinctions. *See supra*, pp. 6-7 (discussing Chief Justice Abrahamson's

concurrence on "damages" in *Hills* and court of appeals' four-category "damages" framework).[6]

Consistent with its petition for review, JCI's brief on the merits also did not argue that the "suit" issue should be addressed.[7] JCI's reply brief further confirmed JCI's understanding that the "damages" question was the only issue presented. The reply brief's summary of the issues referred only to "damages" (App. 156a), and, in response to insurer arguments that *stare decisis* supported leaving *Edgerton*'s holding on "damages" intact, the reply brief asserted that *Edgerton*'s "damages" holding was mere *dicta* and thus "ripe for reversal," but suggested that *Edgerton*'s "suit" holding could be left in place (App. 157a & n.2).

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[6] The body of JCI's petition also made clear that JCI was not asking the Wisconsin Supreme Court to reconsider its "suit" holding in *Edgerton*. First, the heading of the argument section of the petition that corresponds to the fourth issue presented asserted that "*Edgerton*'s 'Damages' *Dictum* Should be Overruled Because Wisconsin Now Stands Virtually Alone in Finding that CERCLA Response Costs are Not 'Damages' and Because the Cases it Relied Upon are No Longer Good Law." Second, the conclusion of that argument section asserted that "*Edgerton*'s rationale is flawed, as the eight years of "arbitrary" and "debatable" distinctions it has produced amply demonstrates," and asked that "*Edgerton*'s 'damages' *dictum* should be overruled." Finally, nowhere in the text of the petition did JCI argue that *Edgerton*'s "suit" holding should be overruled. App. 152a.

[7] If a petition for review is granted by the Wisconsin Supreme Court, the petitioning party "cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court." Wis. Stat. § 809.62(6). Accordingly, JCI's Statement of Issues in its merits brief set forth two questions, both of which concerned only the "damages" issue: (1) "Should the 'damages' dictum in [*Edgerton*] be overruled in light of its inconsistencies with prior Wisconsin law, the 'arbitrary' and 'debatable' distinctions it has produced, and the contrary decisions in the overwhelming majority of other jurisdictions?" and (2) "In applying its four-category 'damages' framework, did the court of appeals err . . . ?" App. 154a. JCI further asserted in its brief that "[i]f *Edgerton* is overruled, Johnson Controls is entitled to judgment on liability for cleanup costs at each" of the sites (App. 154a-155a), but did *not* argue that, if *Edgerton* were overruled, it would also be entitled to costs of defending "suits."

At oral argument, JCI also gave no indication that it sought consideration of the "suit" issue.[8] Nor did the court direct by way of additional orders or suggest at oral argument that the parties should address the "suit" issue.[9]

3. *The Wisconsin Supreme Court's Decision*

In its decision, the Wisconsin Supreme Court overruled *Edgerton* on "damages," as JCI had requested. App. 34a.

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[8] From the outset of the argument, JCI's counsel made clear that the "damages" issue was the only question presented. In describing the policy language at issue, he discussed only the indemnity obligation. In describing the relief sought, he stated that JCI only sought recovery of costs paid to cleanup property "and the question arises ... are those damages." JCI's counsel made passing reference to case law from other states purportedly discussing the adversarial characteristics of PRP letters. However, of the three cases he mentioned, one did not decide the "suit" issue, one was cited in JCI's petition specifically for its "damages" holding, and the third—vaguely referred to as "[t]he Indiana case, *Travelers Indemnity*"—was not cited in JCI's petition or merits briefs. In any event, JCI's counsel stated that these cases concerned the insurer's defense obligation, and "[t]hat's separate from the duty to indemnify," and "[i]n this case, you don't even have to get to the duty to defend."

A recording of the oral argument is available at

http://www.wicourts.gov/supreme/Wisconsin_Supreme_Court_Oral_Arguments.html.

[9] Counsel for another insurer defendant, Travelers Indemnity Company, mentioned the "suit" issue in passing at oral argument. That mention, however, was insufficient to put the parties on notice that the "suit" issue might be considered by the court, and Wausau had no opportunity to respond because counsel for Travelers argued after counsel for Wausau. Travelers had also referred to both the "suit" and "damages" holdings of *Edgerton* in its merits brief. That brief's discussion of the "suit" issue, however, was not framed as a response to any argument by JCI that the "suit" holding of *Edgerton* should be overruled, as JCI had made no such argument in its opening brief. Indeed, in its reply brief, filed after Travelers' brief, JCI never argued that the "suit" holding of *Edgerton* should be overruled. Moreover, Travelers' short mention of the "suit" issue could not be sufficient to put Wausau on notice that the court might address the issue, because Wausau had already filed its merits brief, and had no opportunity to reply to Travelers' brief.

Then, for no apparent reason other than that (according to the court) "[t]he *Edgerton* court's definition of 'suit' gives us pause," the court also proceeded, *sua sponte*, to reconsider and overrule *Edgerton*'s holding on the "suit" issue. App. 34a-41a.

Nowhere in the court's ensuing discussion of the "suit" issue is there any reference to any argument made by the parties on that issue—for there had been no such argument. Moreover, despite reiterating the court's scrupulous adherence to *stare decisis* and the need to set forth a "sufficient justification" when departing from precedent, the decision did not explain why it was appropriate to depart from *stare decisis* and reverse *Edgerton*'s "suit" holding. Rather, the entirety of the court's lengthy discussion of *stare decisis* is limited to reasons justifying overturning *Edgerton*'s "damages" holding. App. 41a-58a.[10]

Two justices dissented. App. 63a-77a. Those justices would have given *stare decisis* effect to *Edgerton*. They pointed out that *stare decisis* "concerns are particularly strong where substantial reliance in the affected business community occurs," and observed that, on both the "damages" and "suit" issues, *Edgerton* had "become part of the basic framework of the insurance industry." App. 67a. On the "suit" issue in particular, the dissenters criticized the court's new rule as dissolving the previously clear line demarcating the institution of formal judicial proceedings, and argued that the new rule "fails to adequately rationalize under what circumstances a PRP letter will trigger a duty to defend." App. 75a.

Wausau filed a motion for reconsideration arguing that the court's *sua sponte* reversal on the "suit" issue violated

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[10] Having determined that *Edgerton* should be disapproved *in toto*, the court remanded the case for further proceedings. The court noted that the insurers had raised defenses to coverage. App. 59a-60a. The court did not, however, identify any defenses to be decided on remand that might relate to whether a PRP letter is a "suit."

its right to due process under the Fourteenth Amendment because it had had neither notice nor an opportunity to be heard on the issue. Wausau pointed out that the court had overlooked substantial reliance interests, principles of contract interpretation, and insurance policy arguments supporting adherence to prior law on the "suit" issue, and that the reversal could cost Wausau tens of millions of dollars. By a 3-2 vote, the court denied Wausau's motion in a one-sentence order. In so ruling, the court effectively foreclosed any opportunity to correct the due process violation created by its decision.[11]

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[11] This Court has jurisdiction under 28 U.S.C. § 1257(a), even though the Wisconsin Supreme Court did not expressly address petitioner's due process argument when it denied reconsideration, and even though that court remanded the case to the lower state courts for further proceedings. First, as in the very similar case of *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-678 (1930), in which this Court ruled that a state supreme court's surprise decision violated the petitioner's due process rights as a litigant, Wausau properly presented its due process objection to the Wisconsin Supreme Court at the earliest possible opportunity, in a motion for reconsideration. Second, the denial of reconsideration amounts to a final judgment on the federal question of whether Wausau was denied due process by that court's decision on the "suit" issue. No further proceedings in state court can affect the fact that the Wisconsin Supreme Court failed to give Wausau notice or an opportunity to be heard before resolving the "suit" issue against Wausau. This is therefore a case in which "the federal issue will be unaffected and undiluted by the later proceedings; hence for all practical purposes the ruling on the federal issue is final." Robert L. Stern et al., *Supreme Court Practice* 153 (8th ed. 2002). Moreover, if this Court reverses the Wisconsin Supreme Court, *Edgerton*'s ruling that PRP letters are not "suits" would once again be the law in Wisconsin, and JCI will have no cause of action against Wausau based on a duty to defend in situations where JCI had merely received a PRP letter. This is therefore a case "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975).

REASONS FOR GRANTING THE PETITION

I. THE WISCONSIN SUPREME COURT'S *SUA SPONTE* RESOLUTION OF A MATTER NOT BEFORE IT, WITHOUT GIVING THE PARTIES NOTICE OR AN OPPORTUNITY TO BE HEARD ON THAT MATTER, DENIED PETITIONER DUE PROCESS

A. Petitioner Was Denied Its Basic Rights To Notice And An Opportunity To Be Heard

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

These fundamental due process requirements are deeply entrenched in the American system of justice. This Court established long ago that the basic prerequisites of due process guaranteed under our Constitution are the intertwined rights of a party to notice and an opportunity to be heard. *See, e.g., Lachance* v. *Erickson*, 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard."); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). "An elementary and fundamental requirement of due process ... is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane*, 339 U.S. at 314, and the basic right of the opportunity to be heard includes the right to respond, *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 468 (2000).

These elemental due process guarantees were disregarded when the Wisconsin Supreme Court *sua sponte* decided the "suit" issue and reversed the decade-old precedent of *Edgerton*. Wausau had no notice that the Wisconsin

Supreme Court would raise and decide the "suit" issue. The issue was not decided by either the circuit court or the court of appeals. JCI's petition for review concerned only the "damages" issue and did not mention the "suit" issue. JCI's brief to the Wisconsin Supreme Court did not discuss the "suit" issue. No justice of the Wisconsin Supreme Court raised the "suit" issue at oral argument. In short, Wausau had no notice, much less "notice reasonably calculated under all the circumstances, to apprise" Wausau that the "suit" issue was under consideration and "afford [it] an opportunity to present [its] objections." *Mullane*, 339 U.S. at 314. As a result, Wausau was deprived of an opportunity to be heard by way of briefing or oral argument before the Wisconsin Supreme Court raised the issue, departed from *stare decisis*, and overturned existing precedent. This Court has had little trouble in finding due process violations in similar peremptory actions by government entities.[12]

The Wisconsin Supreme Court's action stands in stark contrast to this Court's teachings in other cases involving litigants' fundamental due process rights of notice and an opportunity to be heard. For example, this Court has held that a party is deprived of its due process rights when a state supreme court unilaterally reverses existing law—without notice and an opportunity to be heard—leaving the party effectively foreclosed from pursuing an administrative

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[12] *See Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542-545 (1985) (notice and opportunity to respond required before termination of public employee); *Fuentes* v. *Shevin*, 407 U.S. 67, 96 (1972) (state prejudgment replevin statutes violated due process to the extent they did not allow an opportunity to be heard before household goods were seized); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971) (state must provide prior hearing before depriving an individual of driver's license and vehicle registration); *Goldberg* v. *Kelly*, 397 U.S. 254, 260-266 (1970) (due process requires that welfare recipients receive an evidentiary hearing before termination of welfare benefits); *Sniadach* v. *Family Fin. Corp.*, 395 US. 337, 341-342 (1969) (state prejudgment wage garnishment procedure that deprived individual of wages until resolution of the underlying litigation without prior notice or an opportunity to be heard violated due process).

remedy in which to seek a lowering of tax valuations. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930). The Court has also held that the Due Process Clause is violated when a party is bound under the doctrine of res judicata to the rulings in another case as to which it was not a party and had not received any notice. *Richards* v. *Jefferson County, Ala.*, 517 U.S. 793, 799 (1996).

Similarly, in *Lankford* v. *Idaho*, 500 U.S. 110 (1991), the Court ruled that a capital defendant was denied due process when a trial judge sentenced him to death, even though the prosecution had given no notice to the defendant that it was seeking the death penalty. As the Court explained in *Lankford*, "[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Id.* at 126. The Court also recently held in *Nelson*, *supra*, that "the proceedings did not . . . comport with due process" where an amended judgment was entered, without notice or an opportunity to be heard, imposing liability on a corporate officer not previously a party to the proceedings. 529 U.S. at 466.[13] There is no doubt that the unilateral actions of the Wisconsin Supreme Court in this case violated the minimum due process requirements of prior notice and hearing and would, as in *Nelson*, be "questioned even in systems, real and imaginary, less concerned than ours with the right to due process." *Id.* at 468.

B. The Denial Of Any Hearing On The "Suit" Issue Prejudiced Petitioner

There can be no doubt that Wausau was deeply prejudiced by the Wisconsin Supreme Court's surprise decision. By taking up the issue unilaterally, the Supreme Court of Wisconsin deprived Wausau of the opportunity to marshal

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[13] *See also Castro* v. *United States*, 124 S. Ct. 786 (2003) (holding that a district court may not recharacterize *pro se* litigant's motion for new trial as a motion under 28 U.S.C. § 2255 without first warning the litigant of the consequences of such recharacterization).

the significant legal, policy, and reliance-based arguments against that court's reversal on the "suit" issue. The arguments in favor of adherence to *stare decisis* on the "suit" issue are weighty—far more weighty than the Supreme Court of Wisconsin likely understood, given the absence of briefing on the issue. Moreover, the arguments favoring *stare decisis* on the "suit" issue are different and stronger than they were on the "damages" issue. Thus, if the court below had asked for briefing on both issues, it would likely have recognized that, even if *Edgerton*'s holding on the "damages" issue might have been disapproved, its holding on the "suit" issue should have been reaffirmed.[14]

(1) Unlike the "damages" issue, no changes or developments in the law have occurred on whether a PRP letter is a "suit." Many other courts around the country have reached the same result as that reached in *Edgerton*: a PRP letter is not a "suit."[15] Indeed, some courts expressly cited *Edgerton* for that holding and relied on its rationale in reaching the same conclusion. *See, e.g.*, *Foster-Gardner, Inc.* v. *Nat'l Union Fire Ins. Co.*, 959 P.2d 265, 280 (Cal. 1998); *Lapham-Hickey Steel Corp.* v. *Protection Mut. Ins. Co.*, 655 N.E.2d

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[14] Courts in several jurisdictions holding that CERCLA response costs are "damages" have found that a PRP letter is not a "suit." *Compare Lapham-Hickey Steel Corp.* v. *Protection Mut. Ins. Co.*, 655 N.E.2d 842, 846-848 (Ill. 1995) (PRP letter not "suit"), *with Outboard Marine Corp.* v. *Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1212-1216 (Ill. 1992) (CERCLA response costs are "damages"); *compare Professional Rental, Inc.* v. *Shelby Ins. Co.*, 599 N.E.2d 423, 430-431 (Ohio Ct. App. 1991) (PRP letter not "suit"), *with Sanborn Plastics Corp.* v. *St. Paul Fire & Marine Ins. Co.*, 616 N.E.2d 988, 997-998 (Ohio Ct. App. 1993) (CERCLA response costs are "damages"); *compare Harleysville Mut. Ins. Co.* v. *Sussex County, Del.*, 831 F. Supp. 1111, 1130-1132 (D. Del. 1993) (PRP letter not "suit" under Delaware law), *aff'd*, 46 F.3d 1116 (3d Cir. 1994) (Table), *with New Castle County* v. *Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1184-1191 (3d Cir. 1991) (CERCLA response costs are "damages" under Delaware law).

[15] *See* Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 10.04[c][2] (11th ed. 2002) (citing cases).

842, 847 (Ill. 1995). Nor has there been any showing that *Edgerton*'s holding on the "suit" issue has somehow been detrimental to coherence and consistency in the law. Unlike the "damages" ruling—which the Wisconsin Supreme Court found had led to uncertain application in the lower Wisconsin courts—the court reported no difficulties in the lower courts' application of the "suit" ruling.

(2) Wausau would have alerted the court to the important reliance interests implicated by a reversal of *Edgerton* on the "suit" issue. Policyholders may well assert entitlement for all past "defense costs" allegedly incurred for PRP letters within the six years preceding the decision in this case.[16] The volume of such claims could be massive. The Wisconsin Department of Natural Resources' list of contaminated sites contains more than 23,000 open sites.[17] This number only begins to reflect the actual number of claims that might emerge from a site, considering that numerous parties may receive PRP letters at any one site. In light of this information, Wausau estimates the court's *sua sponte* decision on the "suit" issue could cost the company tens of millions of dollars. The impact on the insurance industry will be many times greater.

(3) Wausau would have pointed out that reversal of *Edgerton*'s "suit" holding could have sweeping consequences that were apparently not foreseen by the court. Construing a PRP letter as a "suit" places insurers in an extraordinary dilemma. Under Wisconsin's unique duty to defend case law, an insurer may be estopped from raising its coverage defenses if it fails either to provide its insured with a "free defense" of a "suit," or to intervene in the underlying action and attempt to obtain a stay of the underlying proceedings

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[16] The Wisconsin Statutes provide for a six-year statute of limitations on breach of contract claims. *See* Wis. Stat. § 893.43.

[17] *See* Wisconsin Department of Natural Resources Remediation and Redevelopment Program, Contaminated Land Database, *at* http://www.dnr.state.wi.us/org/aw/rr/brrts/index.htm (last modified Nov. 18, 2003).

pending a declaratory judgment on coverage.[18] Insurers and policyholders may disagree, however, on whether certain costs are properly considered costs of defense (which usually have no policy limit) or indemnity costs. The scope of these disagreements is likely to be greatly magnified if PRP letters are considered "suits." For example, insurers and policyholders may disagree on how the (very substantial) costs of investigating the extent of contamination at a site in response to a PRP letter should be classified. Even if an insurer takes a reasonable position that certain costs undertaken in response to a PRP letter are not properly classified as defense costs and loses that argument, under Wisconsin law it may lose its right to assert any coverage defenses or limits.

The court's decision on the "suit" issue also may have inadvertently eroded several well-established principles of contract construction under Wisconsin law. For example, the *Edgerton* decision, applying the venerable principle that unambiguous language in contracts should be controlling, stressed that the term "suit" has a plain and unambiguous meaning. 517 N.W.2d at 475. In the decision below, however, the court focused not on the plain meaning of the insurance contract, but on the insured's reasonable expectations. App. 38a-39a. This difference in focus from language to expectations might be taken to presage a dramatic shift in Wisconsin contract law. In addition, the court's decision seems to disregard the fundamental principle of insurance contract construction that all terms must be given meaning and not rendered mere surplusage. *See Groteluеschen* v. *Am. Family Mut. Ins. Co.*, 492 N.W.2d 131, 136 (Wis. 1992). The court suggested that the insurer's duty to defend must be interpreted broadly to mirror the insured's obligation to provide notice of an "occurrence, claim, or suit." App. 36a-39a. But "claims" and "suits" are not treated identically in

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[18] *See Newhouse* v. *Citizens Sec. Mut. Ins. Co.*, 501 N.W.2d 1 (Wis. 1993); *Mowry* v. *Badger State Mut. Cas. Co.*, 385 N.W.2d 171 (Wis. 1986).

insurance contracts, as evidenced by the fact that Wausau has the *right*, but not the *obligation*, to settle a "claim" against a policyholder, whereas it has the *duty* to defend against a "suit."

The Wisconsin Supreme Court did not hear any of these substantial arguments, however, because the court took it upon itself to decide the issue without hearing from the parties. Moreover, the mere fact that Wausau had the opportunity to file a motion for reconsideration *after* the court issued its decision was insufficient to protect its due process interests. The Wisconsin Supreme Court has complete and unreviewable discretion under state law to decide whether to entertain a motion for reconsideration, and it may deny such a motion for any reason, or, as in this case, for no reason at all. The mere possibility that a litigant may plead to a decisionmaker that it should exercise its uncabined discretion to change its mind is obviously insufficient to establish the necessary notice and an opportunity to be heard *before* adverse action is taken by the state. The proper time for the Wisconsin Supreme Court to hear the important arguments against overruling *Edgerton* on the "suit" issue was before, not after, it made its decision. *Cf. Nelson*, 529 U.S. at 466 (noting that even an appeal of right may be insufficient for due process when a litigant has been denied notice and a hearing by the trial court); *Goss* v. *Lopez*, 419 U.S. 565, 581 n.10 (1975) (possibility of postdeprivation judicial review of school suspension order insufficient to ensure due process).

II. THE WISCONSIN SUPREME COURT'S *SUA SPONTE* RULING IN THIS CASE IS CONTRARY TO UNIVERSALLY HELD UNDERSTANDINGS OF HOW COURTS SHOULD DECIDE CASES

The Wisconsin Supreme Court's *sua sponte* disposition of the "suit" issue in this case is far out of line with the established way in which courts in this country customarily do business. Surprise *sua sponte* judicial decisionmaking is

fundamentally at odds with our adversary system of justice.[19] "The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness." *Polk County* v. *Dodson*, 454 U.S. 312, 318 (1981). The adversary system of justice not only protects basic guarantees of fair treatment for the parties; it also focuses the parties' attention on issues and prevents courts from lapsing into error. As this Court stated in *Lankford*, "[i]f notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error, and with that, the possibility of an incorrect result." 500 U.S. at 127 (citation omitted).

Virtually every federal court of appeals has held that courts should not dispose of parties' claims without affording them notice and an opportunity to be heard on the question. For example, numerous courts of appeals have held that, as a general matter, district courts may not *sua sponte* dismiss a complaint that sets forth an arguable claim for failure to state a claim without first affording litigants notice and an opportunity to defend the claim.[20] As expressed by Judge

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[19] As Justice Scalia has observed, "[t]he rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); *accord Castro*, 124 S. Ct. at 794 (Scalia, J., concurring in part and concurring in the judgment); *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.); *see also United States* v. *Feola*, 420 U.S. 671, 697 (1975) (Stewart, J., dissenting) (describing the refusal to consider points neither briefed nor argued as "the most basic principle of our adversary system of justice").

[20] *See Clorox Co. Puerto Rico* v. *Proctor & Gamble Commercial Co.*, 228 F.3d 24, 30 (1st Cir. 2000); *Snider* v. *Melindez*, 199 F.3d 108, 113 (2d Cir. 1999); *Stewart Title Guar. Co.* v. *Cadle Co.*, 74 F.3d 835, 836-837 (7th Cir. 1996); *Murphy* v. *Lancaster*, 960 F.2d 746, 748 (8th Cir. 1992) (per curiam); *McKinney* v. *Okla. Dep't of Human Servs.*, 925 F.2d 363, 365 (10th Cir. 1991); *Tingler* v. *Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983), *superseded in part by statute as recognized by Benson* v. *O'Brian*, 179 F.3d 1014, 1015-1016 (6th Cir. 1999); *Jefferson Fourteenth Assocs.* v. *Wometco de Puerto Rico, Inc.*, 695 F.2d 524, 526 (11th Cir. 1983) ("The

Friendly, "the district court has no authority to dismiss a complaint for failure to state a claim upon which relief can be granted without giving the plaintiff an opportunity to be heard." *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1365 (2d Cir. 1985), *aff'd on other grounds*, 476 U.S. 409 (1986). This Court has also noted this practice and its underpinnings, explaining that "[t]his adversarial process . . . crystallizes the pertinent issues." *Neitzke* v. *Williams*, 490 U.S. 319, 329-330 (1989).

Similarly, the courts of appeals consistently require that the parties have notice and an opportunity to present their case before a district court may enter summary judgment or convert a motion to dismiss into a motion for summary judgment.[21] Thus, for example, recognizing that "[t]he opportunity to respond is deeply imbedded in our concept of fair play and substantial justice," the Seventh Circuit has stated that "it is rudimentary that a court cannot *sua sponte* enter summary judgment or dismiss a complaint without notifying the parties of its intentions and allowing them an opportunity to cure the defect in the complaint or to respond." *English* v. *Cowell*, 10 F.3d 434, 437 (7th Cir. 1993).

Several courts of appeals have explicitly grounded their practice of requiring notice and an opportunity to respond

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rule . . . emerges . . . that courts exercise their inherent power to dismiss a suit that lacks merit only when the party who brought the case has been given notice and an opportunity to respond."); *Franklin* v. *Oregon, State Welfare Div.*, 662 F.2d 1337, 1340-1341 (9th Cir. 1981).

[21] *Bendet* v. *Sandoz Pharms. Corp.*, 308 F.3d 907, 912 (8th Cir. 2002); *Clorox*, 228 F.3d at 31 (in converting motions to dismiss into motions for summary judgment courts should "guard against allowing such a conversion where it would come as a 'surprise' or be 'unfair' to the party against whom judgment is rendered"); *Mannesman Demag Corp.* v. *M/V Concert Express*, 225 F.3d 587, 595 (5th Cir. 2000); *Otis Elevator Co.* v. *George Washington Hotel Corp.*, 27 F.3d 903, 910 (3d Cir. 1994); *English* v. *Cowell*, 10 F.3d 434, 437 (7th Cir. 1993); *Hispanics for Fair & Equitable Reapportionment* v. *Griffin*, 958 F.2d 24, 25 (2d Cir. 1992); *United States Dev. Corp.* v. *Peoples Fed. Sav. & Loan Ass'n*, 873 F.2d 731, 736 (4th Cir. 1989); *Yashon* v. *Gregory*, 737 F.2d 547, 552 (6th Cir. 1984).

before allowing a *sua sponte* dismissal on "basic fairness," *Clorox Co. Puerto Rico* v. *Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000). The courts of appeals have recognized that failure to provide notice before *sua sponte* dismissal of a claim is "unfair to the litigants," *Tingler* v. *Marshall*, 716 F.2d 1109, 1111 (6th Cir. 1983), *superseded in part by statute as recognized by Benson* v. *O'Brian*, 179 F.3d 1014, 1015-1016 (6th Cir. 1999), because it can "prejudice plaintiffs by depriving them of an opportunity to amend their complaint or to argue against the dismissal," *Doe* v. *St. Joseph's Hosp.*, 788 F.2d 411, 415 (7th Cir. 1986), *overruled on other grounds by Alexander* v. *Rush N. Shore Med. Ctr.*, 101 F.3d 487 (7th Cir. 1996); *see also Jefferson Fourteenth Assocs.* v. *Wometco de Puerto Rico, Inc.*, 695 F.2d 524, 526-527 (11th Cir. 1983) (district court's *sua sponte* dismissal of a complaint without prior notice deprives a plaintiff of "its due process rights").[22]

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[22] Various provisions of the federal Prison Litigation Reform Act permit, and in some cases require, courts to review certain prisoner and *in forma pauperis* complaints *sua sponte* and to dismiss those that are frivolous or fail to state a claim. *See* 28 U.S.C. §§ 1915(e)(2)(B)(ii), 1915A(b)(1); 42 U.S.C. § 1997e(c)(1). Even in applying these provisions, several courts of appeals require district courts to exercise great caution in dismissing complaints *sua sponte*. *See, e.g.*, *Razzoli* v. *Fed. Bureau of Prisons*, 230 F.3d 371, 377 (D.C. Cir. 2000) (holding that § 1915A(b)(1) does not alter the court's "long-standing rule that a *sua sponte* dismissal for failure to state a claim without leave to amend is reversible error unless the claimant cannot possibly win relief") (internal quotation marks and citation omitted); *Lopez* v. *Smith*, 203 F.3d 1122, 1126-1130 (9th Cir. 2000) (en banc) (holding that under § 1915(e)(2), the district court should grant leave to amend even if no request to amend was made unless it determines that the pleading could not possibly be cured by the allegation of other facts); *Bazrowx* v. *Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998) (per curiam) (noting that it is error for district court to dismiss pursuant to § 1997e unless it provides notice and an opportunity to amend the complaint). Moreover, there is no indication that courts would dismiss a case under these provisions where, as here, the legal issue is complex and the court's disposition of the case would require overruling precedent.

Although in this case, the "suit" issue was decided on appeal rather than by a trial court, the circumstances in which the *sua sponte* action arises are analogous. Both instances involve the courts' *sua sponte* disposition of a legal question that was never addressed by the parties. Indeed, because the Wisconsin Supreme Court is a state court of last resort from which Wausau has no appeal by right, its action is even more inconsistent with fundamental fairness than a federal court's *sua sponte* dismissal of a complaint for failure to state a claim, which may be appealed to a court of appeals exercising *de novo* review.

The Wisconsin Supreme Court's action also contravenes the "sound prudential reasons," *Clorox*, 228 F.3d at 32, underlying the courts of appeals' practice. The courts of appeals have recognized that providing the parties with an opportunity to address issues raised *sua sponte* by the court protects against erroneous judgments, *see Snider* v. *Melindez*, 199 F.3d 108, 113 (2d Cir. 1999), particularly when the issue before the court is complex and contested, *see Clorox*, 228 F.3d at 32. As explained by the Second Circuit, providing notice and an opportunity to be heard "plays an important role in establishing the fairness and reliability of the order" as "[i]t avoids the risk that the court may overlook valid answers to its perception of defects in the plaintiff's case." *Snider*, 199 F.3d at 113. Several courts of appeals have also explained that "*sua sponte* dismissals are not in accordance with our traditional adversarial system of justice because they cast the district court in the role of a 'proponent rather than an independent entity.'" *Tingler*, 716 F.2d at 1111 (citation omitted); *accord Ricketts* v. *Midwest Nat'l Bank*, 874 F.2d 1177, 1184 (7th Cir. 1989); *Brandon* v. *D.C. Bd. of Parole*, 734 F.2d 56, 59 (D.C. Cir. 1984).

There are very limited exceptions to the court of appeals' rule requiring prior notice and an opportunity to be heard before a court may dispose of a party's claim, but those exceptions—themselves designed to ensure that justice is done to parties—are inapplicable here. In particular, some courts of appeals have permitted the *sua sponte* dis-

missal of claims without prior notice where the claims are frivolous, patently without merit, or incapable of being cured by amendment.[23] That exception, which protects parties against the burden of defending against baseless claims that may be made for illegitimate purposes, plainly has no application to this case. Under no circumstances could Wausau's position on the "suit" issue be considered frivolous; it was supported by the holding in *Edgerton*, as well as numerous other state court decisions.

State appellate courts also have recognized that it is "arbitrary and unreasonable" for a court to take actions that would dispose of a party's claims without giving the party notice and an opportunity to be heard. *See Holzer* v. *Jochim*, 557 N.W. 2d 57, 59 (N.D. 1996). Numerous state courts have held that it violates due process for a court to act, *sua sponte* and without notice to the parties, to dismiss a claim, to reinstate a cause of action that had been dismissed for lack of prosecution, or to impose sanctions on an attorney.[24]

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[23] *See, e.g., Clorox*, 228 F.3d at 30-31 (recognizing exceptions for frivolous claims or claims whose defects could not be cured by amendment); *Murphy*, 960 F.2d at 748 (*sua sponte* dismissal is authorized only when it is "patently obvious" that plaintiff cannot prevail); *Baker* v. *Director, U.S. Parole Comm'n*, 916 F.2d 725, 727 (D.C. Cir. 1990) (holding that *sua sponte* dismissal was appropriate when its was "patently obvious" that claimant could not prevail).

[24] *See Heim* v. *California Fed. Bank*, 828 A.2d 129, 138 (Conn. App. Ct.), *cert. denied*, 832 A.2d 70 (Conn. 2003); *Surat* v. *Nu-Med Pembroke, Inc.*, 632 So. 2d 1136, 1137-1138 (Fla. Dist. Ct. App. 1994); *People* v. *Kitchen*, 727 N.E.2d 189, 194-195 (Ill. 2000); *Brown* v. *Triple "D" Drilling Co.*, 585 P.2d 987, 990 (Kan. 1978); *Storer Communications of Jefferson County, Inc.* v. *Oldham County Bd. of Educ.*, 850 S.W.2d 340, 341-342 (Ky. Ct. App. 1993); *Grissom* v. *Grissom*, 886 S.W.2d 47, 57-58 (Mo. Ct. App. 1994); *Klier* v. *Sordoni Skanska Constr. Co.*, 766 A.2d 761, 765-766 (N.J. Super. Ct. App. Div. 2001); *Azar* v. *Prudential Ins. Co. of Am.*, 68 P.3d 909, 933-934 (N.M Ct. App. 2003); *Myung Chun* v. *N. Am. Mortgage Co.*, 285 A.D.2d 42, 45 (N.Y. App. Div. 2001); *Boyle* v. *O'Bannon*, 458 A.2d 183, 184-186 (Pa. 1983); *Creel* v. *District Attorney for Medina County, Tex.*, 818 S.W.2d 45, 46 (Tex. 1991); *see also Rubins* v. *Plummer*, 813 P.2d 778, 789 (Colo. Ct. App. 1990); *Epic Metals Corp.* v. *Samari Lake East*

By contrast, no decision of which we are aware *defends* a judicial practice of ruling against a party, such as Wausau, that has a position with a reasonable basis in fact and law, without allowing that party to be heard beforehand.[25] Yet as this case and as the pending petition in *Turn-Key* demonstrate, courts do not always live up to the principles they espouse. Moreover, this case well demonstrates why surprise decisionmaking by courts should be curtailed. Without notice or an opportunity to address the "suit" issue, Wausau was precluded from raising its substantial arguments as to why *Edgerton*'s holding on the "suit" issue should not have

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Condo. Ass'n, 547 So. 2d 198, 199 (Fla. Dist. Ct. App. 1989); *Gladden* v. *Kansas City*, 411 S.W.2d 228, 229-230 (Mo. 1967); *R. Wilson Plumbing & Heating, Inc.* v. *Wademan*, 588 A.2d 444, 444-446 (N.J. Super. Ct. App. Div. 1991); *Shipley* v. *Shipley*, 509 N.W.2d 49, 55 (N.D. 1993); *In re M.B.*, 514 A.2d 599, 600-601 (Pa. Super. Ct. 1986), *aff'd*, 538 A.2d 495 (Pa. 1988) (per curiam); *State* ex rel. *McLeod* v. *Brown*, 294 S.E.2d 781, 782 (S.C. 1982); *Huminski* v. *Lavoie*, 787 A.2d 489, 492-493 (Vt. 2001); *Osborn* v. *Emporium Videos*, 848 P.2d 237, 241-242 (Wyo. 1993).

[25] Under very limited circumstances, some courts have approved *sua sponte* decisions under the theory that the parties had constructive notice of the court's action based on a background uniform practice or statute. *E.g.*, *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 632 (1962) (upholding dismissal without advance notice or hearing for failure to prosecute where party should have been aware of the consequences of his own conduct); *State* ex rel. *Schatz* v. *McCaughtry*, 664 N.W.2d 596, 604 (Wis. 2003) (upholding review procedure under Wisconsin's Prisoner Litigation Reform Act permitting a trial court to dismiss a pleading for failure to state a claim without providing the prisoner prior notice or an opportunity be heard, in part, because the statute itself puts the prisoner on constructive notice). Under no circumstances, however, does this case fall under this exception. Here, both the existing background practice and statutory constraints on review by the Wisconsin Supreme Court suggested that the court would not consider the "suit" issue. The established practice of the Wisconsin Supreme Court, like this Court, is not to consider issues that were neither raised nor decided in the lower courts. *See, e.g.*, *Terpstra* v. *Soiltest, Inc.*, 218 N.W.2d 129, 133 (Wis. 1974). Moreover, by statute, JCI was precluded from "rais[ing] or argu[ing] issues not set forth in the petition unless ordered otherwise by the supreme court." Wis. Stat. § 809.62(6). Thus, by all indications to Wausau, the state supreme court was not going to consider or decide the "suit" issue.

been overruled. Without the benefit of argument from the parties on this complicated issue that has divided state courts, the Wisconsin Supreme Court may well have reached an incorrect result in this case. Thus, as this case shows, not only fairness of process for litigants but also basic need for better justice dictate that such surprise action by courts should be disapproved.

III. This Court Can Make Clear That Appellate Courts Must Adhere To The Fundamental Requirements Of Due Process Without Unduly Encroaching On The Broad Discretion Of Courts In Adjudicating Cases

The due process principle advocated here is an eminently reasonable one: an appellate court should not reach out to decide a claim that no party has presented to it for resolution where there are substantial arguments on both sides without, at a minimum, permitting the parties to be heard on the matter first. This rule would not impose any undue restrictions on the workings of appellate courts. We do not suggest, for example, that an appellate court must, as a matter of due process, afford oral argument to parties on any particular issue, or indeed at all. When the question at issue is a purely legal one, the opportunity to submit written briefs may well be sufficient to protect the parties' due process rights and to inform the court's decisionmaking.[26] Nor do we suggest that courts are inhibited as a matter of due process from raising issues for the parties to address. Although, as a matter of practice, appellate courts customarily confine themselves to the questions presented by the parties for review, due process does not bind courts to adopt any of the particular legal theories advanced by the parties, and courts have authority to discern and provide the correct legal rule

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[26] Cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 344-346 (1976) (concluding that decisionmaking on paper record was sufficient to satisfy due process).

that governs the controversy.[27] In addition, courts have a well-settled obligation to examine their subject matter jurisdiction to entertain a case, even when that jurisdiction is not contested by the parties—a principle that is perhaps as fundamental to our constitutional system as the guarantees of due process.[28]

But while the scope of permissible judicial discretion in disposing of cases is broad, there is a line that may not be crossed, and that line was not respected in this case. The problem in this case is not just that the Wisconsin Supreme Court decided to reexamine one of its precedents without directing briefs from the parties on that question. An appellate court is not obligated to decide an issue put to it by the parties based on a line of decisions that, the court concludes on reexamination, is unsound.[29] Nor is an appellate court

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[27] *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am.*, 508 U.S. 439, 445-447 (1993) (upholding court of appeals' exercise of its discretion to examine validity of statute, after requesting supplemental briefing from parties); *see also Payne* v. *Tennessee*, 498 U.S. 1080 (1991) (requesting that parties brief whether *Booth* v. *Maryland*, 482 U.S. 496 (1987), should be overruled); *Patterson* v. *McLean Credit Union*, 485 U.S. 617 (1988) (requesting that parties brief whether *Runyon* v. *McCrary*, 427 U.S. 160 (1976), should be overruled); *Colorado* v. *Connelly*, 474 U.S. 1050 (1986) (requesting parties to address validity of waiver of *Miranda* rights); *Capital Cities Cable, Inc.* v. *Crisp*, 464 U.S. 813 (1983) (requesting that parties brief preemption question).

[28] *See Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (courts' resolution of cases outside their subject matter jurisdiction "offends fundamental principles of separation of powers"); *see also Juidice* v. *Vail*, 430 U.S. 327, 331 (1977) (examining parties' standing *sua sponte*); *City of Kenosha, Wis.* v. *Bruno*, 412 U.S. 507 (1973) (concluding *sua sponte* that federal question jurisdiction was lacking), *overruled in part by Monell* v. *Dep't of Social Servs. of New York*, 436 U.S. 658 (1978).

[29] Thus, on numerous occasions, this Court has overruled its own decisions without expressly directing briefing from the parties on that particular question, when it has concluded that the governing precedent was unsound. *See, e.g., Hubbard* v. *United States*, 514 U.S. 695 (1995); *Batson* v. *Kentucky*, 476 U.S. 79 (1986); *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976); *Michelin Tire Co.* v. *Wages*, 423 U.S. 276 (1976); *Mapp* v. *Ohio*,

obligated to disregard important threshold legal issues that might prevent it from adjudicating the merits of a controversy put to it by the parties, even if those threshold issues are not raised by the parties.[30] Rather, the problem in this case is that the Wisconsin Supreme Court adjudicated, without notice, a matter that was entirely separate and distinct from any issue that JCI had submitted to that court for review or that JCI and Wausau had briefed and argued to that court.

As this Court has stated on many occasions, due process is a flexible principle, not a mathematical formula. *See, e.g., Mullane*, 339 U.S. at 314. The Court need not and should not establish a code of procedure for appellate courts to follow in adjudicating cases. But as this case and as the pending petition in *Turn-Key, supra*, demonstrate, there is reason for concern that some appellate courts are not scrupulously observing the basic due process obligations of notice and an opportunity to be heard. Review by this Court is warranted to make clear that appellate courts must provide litigants with these fundamental requirements of fair procedure.

CONCLUSION

The petition for a writ of certiorari should be granted.

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367 U.S. 643 (1961); *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Similarly, the Court has on occasion reformulated the legal standard governing a particular controversy, even when the parties had submitted the case for the Court's decision under a different legal standard. *See Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999); *Employment Div.* v. *Smith*, 494 U.S. 872 (1990).

[30] *See, e.g., Arcadia, Ohio* v. *Ohio Power Co.*, 498 U.S. 73 (1990); *Teague* v. *Lane*, 489 U.S. 288 (1989); *Allen* v. *Hardy*, 478 U.S. 255 (1986) (per curiam).

Respectfully submitted,

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FEBRUARY 2004

APPENDICES

APPENDIX A

2003 WI 108
NOTICE
This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

[STAMP: FILED
JUL 11, 2003
Cornelia G. Clark
Clerk of Supreme Court]

No. 01-1193
(L.C. No. 89 CV 16174)

STATE OF WISCONSIN : IN SUPREME COURT

JOHNSON CONTROLS, INC.

PLAINTIFF-APPELLANT-PETITIONER,

V.

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY (F/N/A EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN), AFFILIATED FM INSURANCE COMPANY, AIU INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY (AS SUCCESSOR TO NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY), AMERICAN EMPLOYERS' INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA, EMPLOYERS MUTUAL CASUALTY COMPANY,

EMPLOYERS REINSURANCE CORPORATION, FEDERAL INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, LANDMARK INSURANCE COMPANY, LONDON MARKET (CERTAIN UNDERWRITERS AT LLOYD'S LONDON AND LONDON MARKET INSURANCE COMPANIES), NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY (AS PREDECESSOR TO ALLSTATE INSURANCE COMPANY), PURITAN INSURANCE COMPANY (F/N/A MANHATTAN FIRE AND MARINE INSURANCE COMPANY), STONEWALL INSURANCE COMPANY, TRANSAMERICA PREMIER INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, UNITED NATIONAL INSURANCE COMPANY, ZURICH INSURANCE COMPANY, INTERNATIONAL
[2] INSURANCE COMPANY, AND WESTCHESTER FIRE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

ALLIANZ UNDERWRITERS INSURANCE COMPANY, AMERICAN CENTENNIAL INSURANCE COMPANY, AMERICAN INSURANCE COMPANY, ASSOCIATED INTERNATIONAL INSURANCE COMPANY, CALIFORNIA UNION INSURANCE COMPANY, CONTINENTAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, HARBOR INSURANCE COMPANY, NORTH STAR REINSURANCE CORPORATION, AND REPUBLIC INSURANCE COMPANY,

DEFENDANTS.

REVIEW of a decision of the Court of Appeals. *Reversed and cause remanded.*

¶1 DAVID T. PROSSER, J. In 1980 Congress adopted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), popularly known as "Superfund," to promote the cleanup of hazardous waste. The Act empowered the federal government, through the Environmental Protection Agency (EPA), to identify hazardous waste sites and pursue remedial activities. As part of the remedial process, the government was authorized to clean up properties and seek compensation from responsible parties or to require polluters and other [3] responsible parties to perform the cleanup themselves. 42 U.S.C. §§ 9601-9675 (2000).[1]

¶2 CERCLA outlines a range of remedial procedures, beginning with requests to furnish information or documents, and ending with stringent enforcement actions to impose fines for noncompliance with orders or costs to recover the government's own expenditures. 42 U.S.C. §§ 9606, 9607.[2] For responsible parties, there is strict liability.

¶3 Nine years ago, this court considered its first case dealing with the insurance issues raised by CERCLA. In *City of Edgerton* v. *General Casualty Co. of Wisconsin*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994), *cert. denied*, 514 U.S. 1017 (1995), we were asked to interpret key terms in the standard Comprehensive General Liability (CGL) policy in relation to CERCLA environmental damage claims.[3] A di-

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[1] All subsequent references to the United States Code are to the 2000 volumes unless otherwise indicated.

[2] Following the implementation of CERCLA, state legislatures enacted similar legislation that would apply to hazardous waste identified under the federal program as well as other substances that other states saw the need to control. *See City of Edgerton* v. *Gen. Cas. Co. of Wis.*, 184 Wis. 2d 750, 756 n.2, 517 N.W.2d 463 (1994) (citing Howell A. Burkhalter, Comment, *Liability for CERCLA Cleanup Costs—Are Insurers the Victims of Judicial Activism?*, 26 Wake Forest L. Rev. 221, 222 n.8 (1991)).

For purposes of simplicity, some references to CERCLA in this opinion are intended to include similar state legislative enactments.

[3] The provision at issue in the *Edgerton* case reads in part:

vided court decided that the [4] issuance of letters by the EPA or the Wisconsin Department of Natural Resources (DNR), which either requested or directed an insured to participate in the environmental cleanup of contaminated property, did not constitute a "suit" sufficient to trigger the insurer's duty to defend. *Id.* at 771. We also held that cleanup and remediation costs under CERCLA did not constitute "sums that the insured may become legally obligated to pay as damages" within the indemnification provisions of CGL policies. *Id.* at 782.

¶4 Today the problems created by the Edgerton decision have become so obvious and so acute that they cannot be ignored. The court is convinced that we did not correctly analyze the term "damages" in the standard CGL policy in relation to environmental cleanup costs under CERCLA. We relied too heavily on a previous decision of this court involving very different [5] facts and laws. We also created an unworkable interpretation of the insurer's duty to defend in the specialized context of CERCLA letters and orders. The process of restoring consistency and coherence to the law must begin by overruling the *Edgerton* decision.

¶5 We hold that an insured's costs of restoring and remediating damaged property, whether the costs are based on remediation efforts by a third party (including the gov-

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> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> . . . .
>
> B. property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such . . . property damage, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient . . . .

Edgerton, 184 Wis. 2d at 769.

ernment) or are incurred directly by the insured, are covered damages under applicable CGL policies, provided that other policy exclusions do not apply. We also conclude that receipt of a potentially responsible party (PRP) letter[4] from the EPA or an equivalent state agency, in the CERCLA context, marks the beginning of adversarial administrative legal proceedings that seek to impose liability upon an insured. A PRP letter significantly affects legal interests of the insured. Therefore, a reasonable insured would expect this letter to trigger its CGL insurer's duty to defend.

I

[6] ¶6 This case involves a CGL policy coverage dispute between Johnson Controls, Inc.,[5] the plaintiff-insured, and more than 30 of its general liability insurance carriers (the insurers). The case has a long history. It began almost three years before this court decided *School District of Shorewood* v. *Wausau Insurance Cos.*, 170 Wis. 2d 347, 488 N.W.2d 82 (1992), and it has been buffeted ever since by a succession of contentious, inconsistent appellate decisions.

¶7 In November 1989 Johnson Controls brought suit in the Milwaukee County Circuit Court against its liability insurers seeking a declaratory judgment and coverage for

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[4] A potentially responsible party letter (PRP letter) is a letter issued by the EPA notifying the recipient that the EPA considers it to be a potentially responsible party for contamination at a given site. 42 U.S.C. § 9622(e). Under CERCLA, potentially responsible parties (PRPs) are expected to conduct cleanup or pay for the cleanup performed by others. *See Prof'l Rental* v. *Shelby Ins.*, 599 N.E.2d 423, 430-31 (Ohio Ct. App. 1991). The EPA identifies the PRPs at each site, negotiates with PRPs to do the cleanup, and recovers from PRPs the cleanup costs spent by the EPA. 42 U.S.C. §§ 9606, 9607, 9622.

[5] Johnson Controls is a Milwaukee-based manufacturer of products and services that manage the use of energy, control, comfort, and that protect life and property in commercial buildings. In 1978 Johnson Controls acquired Globe Union, Inc. (Globe Union), a manufacturer of automotive batteries, and the two companies eventually merged as Johnson Controls, Inc. For purposes of this opinion, references to "Johnson Controls" also include Globe Union, unless otherwise indicated.

various costs relating to the environmental cleanup of 21 property sites. These sites are located in 16 different states where Johnson [7] Controls and/or Globe Union faced liability under CERCLA.[6] Most of the sites are lead smelting plants to which Johnson Controls and/or Globe Union delivered spent lead acid batteries and plant scrap for recycling. Some are contaminated landfills. Three of the 21 sites were owned and operated by Johnson Controls.[7] At 2 of the 21 sites, the coverage issues became moot because Johnson Controls ultimately incurred no costs or liability.

[8] ¶8 For 8 sites, Johnson Controls is seeking coverage for cleanup costs that it incurred in complying with a pre-suit demand from a federal agency, a state agency, or a non-government third-party to remediate the sites in accord

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[6] CERCLA, the Comprehensive Environmental Response, Compensation and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980), empowers the executive branch of the federal government to identify and administer the cleanup of hazardous waste sites. 42 U.S.C. § 9604(a)(1). Response actions may include both removal and cleanup of spilled substances, along with other remedial actions. 42 U.S.C. § 9601(23)-(25). CERCLA established the Superfund as a source of expeditious payment for response actions, although ultimately the liability for response costs is placed on specified classes of responsible parties, which include: past and present owners and operators of the sites; waste generators or other persons who arranged for disposal, treatment or transport of hazardous substances; and transporters of hazardous substances. 42 U.S.C. §§ 9611(a)(1), 9607(a). Responsible parties may be required to perform the cleanup under the mandate of a federal injunction, or the EPA will perform the cleanup itself and then sue responsible parties for reimbursement of costs it incurred. 42 U.S.C. §§ 9606(a), 9607(a)(A)-(B).

Congress amended CERCLA in 1986 in the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986). This amendment served to strengthen the original legislation. Of note, SARA created a statutory right of contribution for responsible parties, allowing them to seek reimbursement of response costs from other parties responsible for contaminating the site. *See* 42 U.S.C. § 9613(f)(1).

Unless otherwise specified, references to CERCLA in this opinion refer to the statute as amended and codified at 42 U.S.C. §§ 9601-9675 (2000).

[7] TCI-Atlanta, JCI-Owosso, and JCI-Goshen.

with CERCLA.[8] These include the 3 sites that Johnson Controls owned.

¶9 For the remaining 11 sites, Johnson Controls was either sued or settled prior to suit for part of the costs of cleanup performed by another party. In some of these cases, the party seeking reimbursement for cleanup was a government agency. In the others, one or more private parties sought a contribution from Johnson Controls for contamination cleanup. Johnson Controls claims that in 6 of these 11 cases, its first awareness of any environmental problem was a lawsuit or demand from a government agency for money to pay costs for cleanup activities that had already been performed by other parties.[9]

[9] ¶10 Johnson Controls avers that in every instance it promptly notified its applicable CGL insurer or insurers of the CERCLA liability claims being made. In every instance the insurers refused to defend Johnson Controls or to indemnify it for any cleanup costs flowing from CERCLA or CERCLA-type claims. The insurers justified their refusal on grounds that the CGL policies did not cover the costs imposed under CERCLA.

¶11 The Johnson Controls CGL policies were issued at various times between the years of 1954 and 1985, and they are either primary, excess, or umbrella comprehensive general liability policies. These policies provide that:

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[8] These 8 sites are: National Steel & Tube Distributors, Lakeland Disposal, JCI-Atlanta, National Smelting & Refining (NL-Atlanta), Maxey Flats, JCI-Owosso, USS Lead Refinery Inc., and JCI-Goshen.

[9] These sites, according to Johnson Controls, are: Bennington Landfill, NL Pedricktown, NL-Granite City, Auto Ion, Union Scrap Iron & Metal Company, Inc., and Delaware Sand & Gravel. The latter 2 sites, according to Johnson Controls, involved suits by the government for past cleanup costs already incurred, without any previous government directive having been issued to JCI. At the remaining 5 sites, Johnson Controls claims that a private party suit followed some prior directive from the government requesting that Johnson Controls remediate the site. These sites are: Bay Drums, Keefe Environmental Services, Inc., Hunt's Disposal, NL-Portland (Gould), and Tonolli.

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily [or personal] injury or property damage to which the policy applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage ....[10]

¶12 Johnson Controls' complaint asserted that this language required its insurers to reimburse Johnson Controls for its costs in complying with its liabilities at the 21 sites, and it sought a declaratory judgment to that effect.

¶13 The complexity of the case led to an extended period of discovery. On May 20, 1992, before the case could go to trial, this court decided *Shorewood*, by a 4-3 vote, in a manner **[10]** that would have helped Johnson Controls. *See Sch. Dist. of Shorewood* v. *Wausau Ins. Cos.*, 168 Wis. 2d 390, 484 N.W.2d 314 (1992) (*Shorewood I*). Three months later, after a motion for reconsideration, the court withdrew its mandated opinion and a new 6-1 majority issued an opinion with a contrary analysis and an opposite result. *Sch. Dist. of Shorewood* v. *Wausau Ins. Cos.*, 170 Wis. 2d 347, 488 N.W.2d 82 (1992) (*Shorewood*).

¶14 In November 1992 the court of appeals issued a unanimous decision in *City of Edgerton* v. *General Casualty Co. of Wisconsin*, 172 Wis. 2d 518, 493 N.W.2d 768 (Ct. App. 1992). This decision distinguished the *Shorewood* case and was helpful by implication to Johnson Controls. Nineteen months later, as the present case was awaiting trial, this court reversed and **[11]** issued its own *Edgerton* opinion.

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[10] Although there is some minor deviation from this language in some of the policies at issue, for purposes of this appeal we view the language in the contested policies as substantively similar to the language presented.

City of Edgerton v. *Gen. Cas. Co. of. Wis.*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994).[11]

[12] ¶15 In *Edgerton*, we concluded that standard CGL policies do not provide indemnification coverage for an insured who cleans up an environmentally contaminated site, regardless of whether or not the insured owns the property, when the remediation is done pursuant to a government directive or request under CERCLA. *Id.* at 782-86. This hold-

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[11] *Edgerton* involved the owner of a landfill site, Edgerton Sand and Gravel, Inc. (ES&G), and the City of Edgerton, the latter of which leased the site for use as the city landfill from 1968 to 1984. *City of Edgerton* v. *Gen. Cas. Co. of Wis.*, 184 Wis. 2d 750, 758-59, 517 N.W.2d 463 (1994). By 1978 the DNR had informed ES&G by letter that it suspected groundwater contamination at the site, and the DNR recommended that the landfill be closed and capped. *Id.* at 759. In 1984 volatile organic compounds were detected in the groundwater underneath and in the vicinity of the site. *Id.* ES&G closed the landfill in 1984 and, during the next year, the site was capped. *Id.* Though the site was closed, groundwater contamination remained, which compelled the DNR to recommend the landfill for placement on the EPA's list of contaminated sites for priority cleanup. *Id.* In June 1989 the EPA notified both ES&G and the City by certified letter that the EPA was investigating the site and the circumstances surrounding the presence of hazardous substances in and around the landfill. *Id.* at 750-60. The EPA then requested that the insureds respond to the DNR's request for information regarding the disposal of hazardous substances at the landfill from 1950 to 1984. *Id.* at 760.

In July 1989 the insureds forwarded the letters received from the EPA to their primary insurance carrier, General Casualty. *Id.* Each insured separately requested defense coverage, with ES&G specifically requesting that General Casualty pay any costs that it may have incurred regarding the site. *Id.* In February 1990 the DNR sent certified letters to both insureds, giving each 30 days to propose a plan for remediation of the site. *Id.* The DNR also indicated that failure to respond would result in the listing of the site on CERCLA's National Priorities List or the taking of immediate state action. *Id.* at 760-62. In response, ES&G notified its excess insurer of its receipt of the EPA information request letter and the DNR enforcement letter, requesting coverage of defense costs as well as any liability resulting from EPA or DNR claims. *Id.* at 762. The insurers denied liability coverage and refused to provide a defense for both the City and ES&G, prompting the insureds to seek a declaratory judgment defining the obligations of the insurance companies under their policies. *Id.*

ing was based on a conclusion that environmental response costs under CERCLA[12] constitute equitable relief, not legal damages, under the policy, and, thus, the insurer had no duty to indemnify its insured for these expenditures. *Id.* at 782. The majority also held that neither a potentially responsible party (PRP) letter nor a comparable notification letter from a state agency constituted a "suit" triggering the insurers' duty to defend. *Id.* at 771, 775. The court concluded that the primary attribute of a suit—that the parties are involved in "actual court proceedings"—was not present where an insured merely receives notification of potential liability from the EPA or the DNR. *Id.* at 775.

¶16 Following the *Edgerton* decision, the insurers in this case moved for summary judgment, arguing that *Edgerton* established that no liability insurance coverage is provided for any insured who cleans up contaminated property pursuant to a government directive or request under CERCLA or similar state laws. On February 24, 1995, the Circuit Court for Milwaukee [13] County, George A. Burns, Jr., Judge, granted summary judgment to the insurers and the case was dismissed as to all sites. Johnson Controls then appealed the various judgments and orders.[13]

¶17 Before the appeal was heard, this court decided another case bearing on legal issues at play in both *Edgerton* and the Johnson Controls appeal. In *General Casualty Co. of Wisconsin* v. *Hills*, 209 Wis. 2d 167, 561 N.W.2d 718 (1997), the insured, a service station owner, sought liability insurance coverage for a claim brought against him by a waste oil recycler seeking recovery of environmental re-

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[12] CERCLA defines "response costs" to include the costs of removing hazardous substances from the environment and the costs of other remedial work. *See* 42 U.S.C. § 9601(25).

[13] At this time, one of Johnson Controls' insurers filed a cross-appeal to address the circuit court's dismissal of its counterclaim against Johnson Controls. The court of appeals ultimately reversed this decision. *Johnson Controls, Inc.* v. *Employers Ins. of Wausau*, Nos. 95-1796 & 95-2591, unpublished slip op. at 15-16 (Wis. Ct. App. Oct. 13, 1998).

sponse costs associated with a contaminated recycling site. *Id.* at 171-172. The EPA had placed the recycling site on the National Priorities List[14] and the United States had brought suit against the recycler and other defendants, but not against the service station owner. *Id.* No government agency had ever notified the insured service station owner of potential liability under CERCLA or requested that he develop a remediation plan or incur remediation and **[14]** response costs. *Id.* at 180. This court held that, so long as there was no request or directive by the government, the insured was covered under his CGL policy for compensatory, monetary relief sought by third parties for losses they incurred due to the insured's alleged past contamination of the property. *Id.* at 185.

¶18 After *Hills* was decided in April 1997, the court of appeals addressed Johnson Controls' appeal. In an unpublished decision dated October 13, 1998, the court of appeals attempted to apply the holdings of *Edgerton* and *Hills* in assessing whether response and remediation costs incurred by Johnson Controls qualified as "damages" under Johnson Controls' CGL policies. *Johnson Controls, Inc.* v. *Employers Ins. of Wausau*, Nos. 95-1796 & 95-2591, unpublished slip op. (Wis. Ct. App. Oct. 13, 1998) (*Johnson Controls I*). The court developed four categories to determine whether the various sites would or would not be covered.

¶19 The first category consists of *Edgerton*-type sites. These involve situations where the insured is responsible for cleaning up the contamination at a site pursuant to a government directive under CERCLA, or a state counterpart, and the insured performs the cleanup. Citing *Edgerton* and *Amcast Industrial Corp.* v. *Affiliated FM*

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[14] The National Priorities List is a list of polluted sites compiled by the EPA, as required by CERCLA. 42 U.S.C. § 9605. A site's placement on the list makes it eligible to be cleaned up through CERCLA-related means. *See Blasland, Bouck & Lee, Inc.* v. *City of N. Miami*, 283 F.3d 1286, 1289 n.1 (11th Cir. 2002) (citing 42 U.S.C. § 9605).

Insurance Co., 221 Wis. 2d 145, 584 N.W.2d 218 (Ct. App. 1998), the court said that the costs of this type of remediation are not "damages" and, therefore, no insurance coverage is required in connection with the remediation of these sites.

[15] ¶20 The second category consists of situations governed by *Hills*. An insured is responsible for at least part of the contamination of a site that it does not own. The insured is not contacted by the government in any manner regarding cleanup of the property. Instead, a government agency has directed others responsible for the contamination to remediate the site and they, in turn, file suit against the insured to recover the cleanup costs attributable to the insured. Pursuant to the *Hills* holding, CGL coverage is given to an insured for remediation at these sites. *Id.*

¶21 The court of appeals then devised two new categories that it said were the logical extensions of the *Edgerton* and *Hills* decisions. *Johnson Control I*, Nos. 95-1796 & 95-2591, unpublished slip op. at 7-10.

¶22 The third category consists of situations in which the insured is at least partially responsible for contaminating a site that it does not own. It is then directed by a governmental entity to remediate the site, but fails to do so. The insured in category three, like the insured in *Regent Insurance Co.* v. *City of Manitowoc*, 205 Wis. 2d 450, 463, 556 N.W.2d 405 (Ct. App. 1996), is *sued* by the government to recover **[16]** money that the government spent to remediate the site.[15] According to the court of appeals'

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[15] *Regent Insurance Co.* v. *City of Manitowoc*, 205 Wis. 2d 450, 556 N.W.2d 405 (Ct. App. 1996), held that where the government sues "an insured to recover incurred cleanup costs under § 107(a)(4)(A) of [CERCLA] . . . or to impose a plan for remediation, that action is not a 'suit for damages' but is, rather, a suit for 'equitable monetary relief.'" *Id.* at 463. Johnson Controls argued before the court of appeals that our decision in *Hills* overruled *Regent*. The court of appeals disagreed, noting that the vitality of *Regent* was reaffirmed post-*Hills* by *Hydrite Chemical Co.* v. *Aetna Casualty & Surety Co.*, 220 Wis. 2d 26, 39 n.5, 582 N.W.2d 423 (Ct. App. 1998).

analysis, the recovery sought by the government remains equitable in nature and, therefore, no insurance coverage is obtained in the situations encompassed by category three. *Johnson Control I*, Nos. 95-1796 & 95-2591, unpublished slip op. at 11.

¶23 A fourth category consists of situations similar to category three, except that the insured is sued by the site's owner or by other third parties who are also responsible for the contamination, any of whom cleaned up the site at the government's direction. The government is not involved in the suit against the insured. As with categories one and three, the court of appeals concluded that there is no insurance coverage for sites in this category. *Id.*

¶24 The court of appeals indicated that categories three and four are subsumed under the rationale of *Edgerton*, since neither the government nor the third party in these cost recovery actions is seeking "legal damages" for injury to [17] property caused by an insured. The rationale for non-recovery was later explained as follows:

> Rather, the government and property owners forced by the government to clean up contamination allegedly caused by Johnson Controls are seeking what *Edgerton* noted was "equitable monetary relief," that is, recompense for monies spent in complying with the nation's environmental-protection laws—*money that would have been spent by Johnson Controls if it had complied with the government's cleanup directives.*

Johnson Controls v. *Employers Ins. of Wausau*, 2002 WI App 30, ¶9, 250 Wis. 2d 319, 640 N.W.2d 205 (*Johnson Controls II*), (citing *Edgerton*, 184 Wis. 2d at 784).

¶25 Having articulated the preceding categories, the court of appeals remanded the matter for the entry of a global judgment, instructing the circuit court to break down its decision into subparts reciting: "(1) the property involved; (2) the insurance company or companies and the relevant dates of their policies that relate to the property; and (3) the result required by this opinion." *Johnson*

Controls I, Nos. 95-1796 & 95-2591, unpublished slip op. at 12.

¶26 On remand, the Milwaukee County Circuit Court, Michael P. Sullivan, Judge, determined that all 21 sites at issue fell into categories one, three, or four, meaning that the costs incurred by Johnson Controls at these sites were not "legal damages" entitled to insurance coverage under its CGL policies. Johnson Controls appealed once again. After concluding that the circuit court's findings of fact were not clearly erroneous, the court of appeals affirmed the circuit court's finding that no [18] coverage was afforded to Johnson Controls. *Johnson Controls II*, 250 Wis. 2d 319, ¶26. Johnson Controls petitioned this court for review, which we granted.

II

¶27 The core of this matter is the continuing vitality of *Edgerton*. While Johnson Controls maintains that, even if *Edgerton* is upheld, the insurers must provide coverage in situations governed by categories three and four of the *Johnson Controls I* schema, it nonetheless launches an overt assault on *Edgerton*'s holdings. Johnson Controls asks this court to overrule *Edgerton* because the decision was a misapplication of Wisconsin law, it created an arbitrary and unworkable system for resolving issues that arise in the context of insurance coverage for environmental damage, and the legal rationales for the decision have completely eroded. Conversely, the insurers beseech this court to uphold its precedent, adhere to the rationale of *Edgerton*, and, upon doing so, recognize that categories three and four must necessarily be denied consonant with *Edgerton*.

¶28 In determining whether *Edgerton* should survive, we engage in two levels of analysis. First, we must assess whether the conclusions of *Edgerton* were incorrect as a matter of law. If we determine that the opinion was fundamentally wrong, then we must grapple with *Edgerton*'s standing as controlling legal precedent in Wisconsin. In other words, even if this court determines conclusively that

Edgerton misapplied principles of Wisconsin insurance law and misconstrued the nature of the **[19]** relief sought in CERCLA cost recovery actions, we still must decide whether these errors require the court to overrule its recent precedent and deviate from the doctrine of stare decisis.

III

¶29 Johnson Controls seeks coverage under its various CGL policies. With regard to the insurers' duty to indemnify, the policies provide: "The [insurer] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which the policy applies, caused by an occurrence." As for the insurers' duty to defend, the policies provide that the insurer "shall have the right and duty to defend any suit against the insured seeking damages on account of such . . . property damage." All policies at issue have language either identical or substantially similar to the preceding terms.

¶30 The interpretation of words or clauses in an insurance contract is a question of law that we review de novo. *See Just* v. *Land Reclamation, Ltd.*, 155 Wis. 2d 737, 744, 456 N.W.2d 570 (1990). As we explained in *Hills*, the method by which Wisconsin courts determine whether an insurance contract requires coverage of a particular claim is familiar:

> In general, the interpretation of an insurance contract is controlled by principles of contract construction. *See, e.g., Kuhn* v. *Allstate Ins. Co.*, 193 Wis. 2d 50, 60, 532 N.W.2d 124 (1995); *Maas [*v. *Ziegler]*, 172 Wis. 2d [70], 79, 492 N.W.2d 621 [(1992)]. The primary objective in interpreting a contract is to ascertain and carry out the intentions of the parties. *See, e.g., Maas*, 172 Wis. 2d at 79; *Kremers-Urban Co.* v. *American Employers Ins. Co.*, 119 **[20]** Wis. 2d 722, 735, 351 N.W.2d 156 (1984). "Of primary importance is that the language of an insurance policy should be interpreted to

> mean what a reasonable person in the position of the insured would have understood the words to mean." *Sprangers*, 182 Wis. 2d at 536; *accord, e.g.*, *Kuhn*, 193 Wis. 2d at 60; *Kremers-Urban Co.*, 119 Wis. 2d at 735.

Hills, 209 Wis. 2d at 175. These principles guide our interpretation of the policy language at issue in this case.

A. Are CERCLA Response Costs Damages?

¶31 We first address whether CERCLA response costs are "sums which the insured shall become legally obligated to pay as damages." To answer this question, we must comprehend the nature of environmental response costs as understood by a reasonable insured faced with CERCLA liability.[16]

¶32 The insurers contend that, when the government seeks cleanup costs under the authority of CERCLA (or similar state regulation), the government is seeking relief in the form of (a) restitution through a cost-recovery action,[17] or (b) injunction **[21]** through administrative order.[18]

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[16] As we stated in *Hills*, the focus of our analysis in this case is on interpretation of the insurance policies and not on environmental law. *General Casualty Co. of Wisconsin* v. *Hills*, 209 Wis. 2d 167, 175, 561 N.W.2d 718 (1997). The parties and amici curiae have extensively argued, in varying forms, how competing interpretations of the CGL policy will impact on the efficient and effective remediation of pollution. While we are sensitive to these issues, these discussions are not probative of whether coverage obtains under Johnson Controls' policies.

[17] 42 U.S.C. § 9607(a)(4)(A).

[18] Section 107(a)(4) of CERCLA, codified as 42 U.S.C. § 9607(a)(4), establishes the right of a cost recovery action of parties against other parties responsible for contamination at a site remediated under CERCLA. It provides that all responsible parties

> shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

Because the insurers argue that both forms of relief are "equitable," that is, not legal damages," coverage is excluded.

[22] ¶33 Johnson Controls takes the opposite position. It contends that response costs are "damages" from the perspective of an ordinary insured because the law imposes costs on the insured to remediate property that the insured previously damaged. These response costs should thus be covered.

¶34 When this issue was first addressed in *Edgerton*, a majority of the court concluded that CERCLA response costs do not constitute "damages" under standard CGL policies. *Edgerton*, 184 Wis. 2d at 782. The *Edgerton* majority looked primarily to *School District of Shorewood*,

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(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release[.]

42 U.S.C. § 9607(a)(4). In the alternative, the government can seek, under certain circumstances, a court order to require responsible parties to perform remedial actions through a Unilateral Administrative Order. This authority is granted under Section 106 of CERCLA, which provides in part:

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section [22] including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

42 U.S.C. § 9606(a).

170 Wis. 2d at 347, for guidance in interpreting the "as damages" language in the insureds' CGL policies.

¶35 In *Shorewood*, two school districts sought liability insurance coverage under their CGL policies for their costs in defending an action for declaratory and injunctive relief and their costs in complying with the terms of subsequent settlement to correct alleged practices of illegal segregation and racial discrimination in education. *Id.* at 356-62.[19] The court noted that:

> **[23]** The apparent goal of the plaintiffs in the underlying action was the desegregation of the Milwaukee area school system. The amended complaint sought only declaratory and injunctive relief whose purpose was "to eliminate the remaining vestiges of segregation in the school districts and schools in the Milwaukee metropolitan area." The amended complaint did not seek to presently compensate the victims of past discrimination. Therefore, no "damages" were sought in the underlying action.

Id. at 371.

¶36 The *Shorewood* court recognized that the types of costs being sought were largely to indemnify the school district for future public expenditures. To explain why such costs did not fall within our traditional concept of "damages," the court concluded that the term "damages," when used in CGL insurance policies, unambiguously means "legal damages"—that is, "legal compensation for past wrongs or injuries"—which are generally pecuniary in nature. *Id.* at 368. Then the court added: "The term 'damages' does not encompass the cost of complying with an injunctive decree." *Id.*

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[19] As in this case and in *Edgerton*, the policies at issue in *Shorewood* qualified the insurer's duty of indemnification to only those sums which the insured is "legally obligated to pay as damages." *Sch. Dist. of Shorewood* v. *Wausau Ins. Cos.*, 170 Wis. 2d 347, 358 n.1, 488 N.W.2d 82 (1992).

¶37 This last sentence was critical. Citing *Black's Law Dictionary*, Professor Dan Dobbs' *Handbook on the Law of Remedies* (1973), *Pure Milk Products Cooperative* v. *National Farmers Organization* (*Pure Milk II*), 90 Wis. 2d 781, 280 N.W.2d 691 (1979), and *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267 (1977), the court hammered the distinction between compensation for past wrongs and injunctive relief that looks to the future.

> An injunction looks to the future conduct of the parties and is preventive in nature. Damages, on the other hand, are remedial in nature, not preventive. The remedy of injunction in only available if the plaintiff can establish that a continuing or **[24]** anticipated injurious act is not adequately compensable in damages.

Shorewood, 170 Wis. 2d at 370 (citing *Pure Milk II*, 90 Wis. 2d at 800).

¶38 In retrospect, the rationale for the *Shorewood* decision was too broadly stated, and we reject its overly restrictive definition of damages.

¶39 Succeeding courts should have noticed that the *Shorewood* court's key sentence—"The term 'damages' does not encompass the cost of complying with an injunctive decree"—was inconsistent with the language of authorities quoted in the opinion.

¶40 For instance, *Shorewood* cited Dobbs, *Handbook on the Law of Remedies*, for the proposition that judicial remedies fall into four major categories: damage remedies, restitutionary remedies, coercive remedies (such as injunctions that are backed by the court's contempt power), and declaratory remedies. *Shorewood*, 170 Wis. 2d at 368 (citing Dobbs, *supra*, § 1.1 at 1 (1973)). The court then summarized the law: "This classification scheme is based on the *nature* and *purpose* of the relief awarded. . . . *A classification based on the form of the action, as either equitable or legal, is irrelevant.*" *Id.* at 369 (emphasis added). The substance of Dobbs' 1973 treatise is that if the *purpose* of a remedy is to compensate a party for some loss,

the purpose of the remedy overshadows the *form* of the action.

[25] ¶41 We note that Justice Abrahamson cited the same Dobbs treatise and the exact same page in the original *Shorewood* opinion, writing that "Although the main purpose of 'damages' at law is generally viewed as compensatory, the damages remedy is not wholly compensatory. At the same time, mandatory injunctive relief may also be 'compensatory' in nature." *Shorewood I*, 168 Wis. 2d at 416 (citing Dobbs, *Handbook on the Law of Remedies* § 1. 1, at 1 (1973)).

¶42 *Shorewood* also quoted from *Pure Milk II*: "[A]n injunction is designed to prevent injury, *not to compensate for past wrongs*, and [ ] an injunction may issue merely upon proof of a sufficient threat of future irreparable injury." *Shorewood*, 170 Wis. 2d at 370 (quoting *Pure Milk II*, 90 Wis. 2d at 802) (emphasis added). But *Pure Milk II* also explained that:

> The injunction is a preventive order looking to the future conduct of the parties. To obtain an injunction, a plaintiff must show a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff. To invoke the remedy of injunction the plaintiff must moreover establish that the injury is irreparable, *i.e. not adequately compensable in damages.*

Pure Milk II, 90 Wis. 2d at 800 (citations omitted) (emphasis added).

¶43 A careful reading of these authorities suggests that if an equitable action is providing compensation for past wrongs—if it is "remedial in nature"—it cannot be lumped **[26]** indiscriminately with a typical injunction, because it is serving a different purpose from a typical injunction.

¶44 The *Edgerton* opinion was too quick to embrace the strict dichotomy between legal damages and equitable actions set out in *Shorewood*. The *Edgerton* court's five-page discussion of damages relied heavily on *Shorewood*'s key sentence that "The term 'damages' does not encompass

the cost of complying with an injunctive decree," and it constructed its analysis to conform to that faulty principle. *Edgerton*, 184 Wis. 2d at 783 (quoting *Shorewood*, 170 Wis. 2d at 368).

¶45 *Edgerton* made a second mistake. It misapplied *Shorewood*'s holding regarding the scope of the "as damages" limitation in CGL policies because it did not appreciate the nature of liability for environmental cleanup costs under CERCLA or how that liability would be understood by a reasonable insured. The *Edgerton* majority summarily concluded that response costs under CERCLA were equitable relief similar to the school districts' settlement in *Shorewood*, *Edgerton*, 184 Wis. 2d at 785,[20] and, as such, were not designed to compensate aggrieved parties for past wrongs and did not fall within the policy coverage. *Id.* The majority reasoned that response costs were designed to deter future contamination by means of an [27] injunctive action, "*while providing for remediation and cleanup of the affected site[s].*" *Id.* (emphasis added).

¶46 The distinction between legal and equitable remedies relied upon in *Shorewood* has very limited applicability to CERCLA. Because CERCLA serves dual purposes and provides multiple avenues for achieving these purposes, the operation of the statute and its legal obligations will be confused if one attempts to fit the nature of the liability imposed into a strict equitable/legal damages dichotomy. *See* John A. Mathias, Jr., et al. *Insurance Coverage Disputes* § 9.02[1], at 9-18 (1996 & Supp. 2003).

¶47 CERCLA attempts to promptly remediate polluted sites to bring land back to its original uncontaminated

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[20] This conclusion seems to follow a subtle error in the *Shorewood* decision. The paradox of *Shorewood* is that it correctly instructed courts not to look to the form of the action but to the nature of the relief requested, *Shorewood*, 170 Wis. 2d at 369, but it then ignored this command itself in deeming *all* injunctive relief as being equitable in nature.

condition. However, CERCLA also imposes liability.[21] The costs of accomplishing remediation efforts are expressly expected to be borne by the parties responsible for the polluted condition of the land.[22] The only reason Johnson Controls had to expend money for the sites named in its complaint, either to clean up the properties directly or to reimburse others who had remediated **[28]** the properties, was because its liability under CERCLA had been established, based on its contribution, in some form, to the pollution of the properties.

¶48 Under this system, the nature of relief in CERCLA response cost actions is not confined to future injuries; it includes "legal recompense for injuries sustained." *See Shorewood*, 170 Wis. 2d at 372.[23] Thus, there is both a prospective and remedial element to an insured's response cost liability. Because CERCLA proceedings seek the costs of repairing damaged property, rather than the cost of conforming one's future conduct, the nature of relief is, at least in part, compensatory. *See Boeing Co.* v. *Aetna Cas. & Sur. Co.*, 784 P.2d 507, 511 (Wash. 1990). The harm for which CERCLA liability attaches is based on past wrongs and injuries to property, *Shorewood*, 170 Wis. 2d at 368, and

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[21] *See Aviall Servs., Inc.* v. *Cooper Indus., Inc.*, 312 F.3d 677, 681 (5th Cir. 2002) ("CERCLA's twin purposes are to promote prompt and effective cleanup of hazardous waste sites and the sharing of financial responsibility among the parties whose actions created the hazards.").

[22] *See, e.g., Smith Land & Improvement Corp.* v. *Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988); Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv. Envtl. L. Rev. 199, 279 (1996).

[23] *See Fed. Ins. Co.* v. *Susquehanna Broad. Co.*, 727 F. Supp. 169, 174 (M.D. Pa. 1989) ("To recognize that damages are not equitable relief does not answer the specific question whether the costs of restoring land to its original condition are, nevertheless, recoverable in damages."); *C.D. Spangler Const. Co.* v. *Indus. Crankshaft & Eng'g Co., Inc.*, 388 S.E.2d 557, 568 (N.C. 1990) (citing *Port of Portland* v. *Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986)) ("once 'property damage' occurs injuring a third party, costs associated with remedying it are 'damages' within the meaning of the liability policy").

may be characterized as consequential damages flowing from the direct damage caused to the environment. *See Minn. Mining & Mfg. Co.* v. *Travelers Indem. Co.*, 457 N.W.2d 175, 182 (Minn. 1990).

[29] ¶49 The availability of cost recovery actions under Section 107 of CERCLA shows that a responsible party's liability under CERCLA *is* adequately compensable as damages. In fact, a government injunction to an insured to remediate contaminated property is an alternative to a monetary damages action for injury to the property.[24] Under CERCLA, injunctive relief may be available *even though* legal or restitutive remedies are adequate. *See AIU Ins. Co.* v. *Superior Court*, 799 P.2d 1253, 1277 (Cal. 1990). This option is one of several factors that distinguish CERCLA remedies from the traditional injunctions described in *Shorewood.*

¶50 CERCLA does not regulate prospective conduct in the traditional sense that governments regulate commercial behavior. *See New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1041 (2d Cir. 1985) ("CERCLA is not a regulatory standard-setting statute such as the Clean Air Act."). Rather, it seeks to impose strict liability on corporations and other entities for damages to **[30]** property done in the past. None of the costs at issue in this case appear to have been incurred by Johnson Controls to improve the cleanliness of ongoing processing or to comply with government

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[24] *See Boeing Co.* v. *Aetna Cas. & Sur. Co.*, 784 P.2d 507, 512 (Wash. 1990) (quoting *United States Aviex Co.* v. *Travelers Ins. Co.*, 336 N.W.2d 838, 843 (Mich. App. 1983)):

> If the state were to sue in court to recover in traditional "damages", including the state's costs incurred in cleaning up the contamination, for the injury to the ground water, defendant's obligation to defend against the lawsuit and to pay damages would be clear. It is merely fortuitous from the standpoint of either plaintiff or defendant that the state has chosen to have plaintiff remedy the contamination problem, rather than choosing to incur the costs of clean-up itself and then suing plaintiff to recover those costs.

regulations requiring business practices conforming to some standard.[25] Therefore, an injunction in this context is materially distinguishable from a traditional injunction, such as the one at issue in *Shorewood*.

¶51 It is true that the protection of human health and welfare is a future benefit from remediating damaged property. However, shifting the focus from remediating past damages to preventing future injury from contamination does not change the remedial nature of CERCLA response costs for *completed* past actions.

¶52 The *Edgerton* opinion points to 42 U.S.C. § 9607(a), paragraphs (A) and (C), to justify its conclusion that response costs are not damages, asserting that response costs "are, by **[31]** definition, considered to be equitable relief and reflect a congressional intent to differentiate between cleanup or response costs under 42 U.S.C. sec. 9607(a)(4)(A) and damages for injury, destruction, or the loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C)." *Edgerton*, 184. Wis. 2d at 784. This conclusion was then, and is now, disputed by other courts.[26]

¶53 In § 9607(a), CERCLA outlines four kinds of liability, one of which speaks of "damages." However, while the four kinds of liability are not congruent, that does not

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[25] In fact, another federal statute, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992, which preceded CERCLA by a few years, regulates the present-day handling of hazardous wastes and carries its own enforcement mechanisms. *See Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 483 (1996) ("RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste. Unlike [CERCLA] RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. RCRA's primary purpose, rather, is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'") (citations omitted).

[26] *See, e.g., United States Aviex Co.* v. *Travelers Ins. Co.*, 336 N.W.2d 838, 843 (Mich. App. 1983).

mean they do not overlap, nor does it mean that a reasonable insured would expect coverage for one government response to environmental damage but not for another. In any event, *Edgerton* implies that *any* government involvement with the insured precludes coverage, whether the coverage is sought as damages under (A) or (C) of § 9607(a)(4).

¶54 In *Shorewood*, the court acknowledged that the school districts had cited many cases "which have held that environmental cleanup costs under [CERCLA] constitute 'damages' under the terms of insurance policies." *Shorewood*, 170 Wis. 2d at 372-73. It went on to say that courts around the country "do not uniformly agree that clean-up costs under CERCLA constitute 'damages' under the terms of insurance policies." *Id.* at 373. Then, significantly, the court said:

> The issue of whether clean-up costs constitute "damages" under the terms of an insurance contract has **[32]** never been addressed by a Wisconsin court. *Such an important issue should not be decided in a cursory fashion by this court.* Therefore, we decline to adopt or apply the analogy posited by the school districts.

Id. at 374 (emphasis added). Unfortunately, the *Edgerton* court treated CERCLA response costs as though the issue had been decided in *Shorewood*, when it had not.

¶55 There is a third deficiency in the *Edgerton* opinion. *Shorewood* quoted extensively from Professor Dan Dobbs, a "noted authority on remedies." *Shorewood*, 170 Wis. 2d at 368-69. The quotations were taken from the 1973 edition of Dobbs' *Handbook on the Law of Remedies*. In the 1993 revision of his treatise, Professor Dobbs directly addresses the issue of response costs in environmental damages actions and concludes:

> Response costs recoverable [under CERCLA] are analogous to repair costs and consequential damages that a private landowner-plaintiff might recover in similar situations. . . . Such items [of response costs] are closely analogous to common

> law consequential damages. . . . Response costs are very high, but in spite of the terminology, they closely resemble familiar common law types of damages.

Dan B. Dobbs, *Law of Remedies* § 5.2(5), at 727 (1993).

¶56 Professor Dobbs then made clear that there is no fundamental distinction between response costs (sought under 42 U.S.C. § 9607(a)(4)(A)-(B)) and natural resource damages (sought under § 9607(a)(4)(C)) as to their classification as "damages."

> The normal terminology of the law would probably treat the recovery for natural resource damages and also the recovery of response costs as damages. Both compensate for loss incurred. It often happens, however, compensation and restitution turn out to yield the same dollar amount. That might be the case with response costs. . . .
>
> **[33]** . . . [I]t is important to characterize a liability as restitutionary only if restitution differs in amount from damages or if there is no substantive basis for recovery as damages. Under [CERCLA], there is a substantive basis for recovery of "response costs," which are not otherwise characterized by the statute. The amount to be recovered does not differ according to the characterization as restitution or damages. *Attempts to characterize the recovery of response costs as either restitution or damages do not seem helpful.* Usually the attempt is made only to determine whether an insurance policy covers liability for release of hazardous substance. *It is doubtful that the term "damages" in an insurance policy carries with it any such inchoate set of distinctions and the question whether response costs are covered by the policy probably cannot turn on proposed definitions of those costs as restitution without distorting the remedial concepts involved.*

Id. at 729-30 (footnote omitted) (emphasis added). The explanation offered by Professor Dobbs severely weakens *Edgerton*'s basis for construing the "as damages" language as exempting CERCLA response costs based on their remedial nature. The dissent in *Edgerton* quoted from the 1993 treatise. *Edgerton*, 184 Wis. 2d at 792-93 (Abrahamson, J., dissenting). The majority opinion never rebutted the dissent's use of Dobbs or acknowledged that one of the main props of the *Shorewood* opinion had been removed.

¶57 There is a fourth problem with *Edgerton*, as was revealed in *Hills*. The court stated in *Hills* that, "It has long been the law of this state that the cost of *repairing* and *restoring* damaged property and water to its original condition is a proper measure of compensatory damages." *Hills*, 209 Wis. 2d at 181 (emphasis added). The court cited a number of **[34]** cases and authorities to support this proposition.[27] The *Edgerton* opinion simply did not address this body of law.

¶58 This brings us to *Hills*. In *Hills*, we concluded that, when a third party sues an insured for reimbursement of the third party's response costs under CERCLA and the insured then seeks liability insurance coverage, the insured is seeking coverage for legal damages to compensate the third party for past wrongs. *Id.* at 181.

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[27] In support of this proposition, the *Hills* court cited *Jost* v. *Dairyland Power Coop.*, 45 Wis. 2d 164, 172 N.W.2d 647 (1969); *Anstee* v. *Monroe Light & Fuel Co.*, 171 Wis. 291, 177 N.W. 26 (1920); *Pedelty* v. *Wisconsin Zinc Co.*, 148 Wis. 245, 134 N.W. 356 (1912); *Fortier* v. *Flambeau Plastics Co.*, 164 Wis. 2d 639, 476 N.W.2d 593 (Ct. App. 1991); 1 Russell M. Ware, *The Law of Damages in Wisconsin* §§ 18.4 & 18.22 (1988 & Supp. 1996); Wis JI—Civil 1804. *See also Wisconsin Public Serv. Corp.* v. *Heritage Mut. Ins. Co.*, 200 Wis. 2d 821, 830, 548 N.W.2d 544 (Ct. App. 1996), aff'd, 209 Wis. 2d 160, 561 N.W.2d 726 (1997) ("*Nischke [v. Farmers & Merchants Bank & Trust*, 187 Wis. 2d 96, 522 N.W.2d 542 (Ct. App. 1994)] is instructive because it stands for the proposition that when a landowner spends money in response to a government directive to remediate, the money can be recovered as legal damages from the tortfeasor.").

¶59 *Hills* made a valiant attempt to coexist with *Shorewood* and *Edgerton*. It explained why principles of Wisconsin law on remedies afforded coverage to *Hills*. The court said that the third party seeking contribution from the insured was not seeking a remedy based on the insured's failure to take corrective action or failure to aid in the prospective remediation of the property. Rather, "the fundamental remedy Arrowhead [third party] seeks from Hills [insured] is **[35]** compensatory damages *for the past injuries he allegedly inflicted on the Arrowhead site*." *Id.* at 182 (emphasis added). In truth, this language simply relabeled the contribution to response costs as compensatory damages for past injuries.

¶60 Although *Hills* purported to sustain the rule of *Edgerton*, it effectively obliterated its intellectual foundation. To find coverage under the same CGL policies that were at issue in *Edgerton*, *Hills* concluded that the nature of the relief sought in the cost recovery action *was not* merely equitable relief.[28] Furthermore, *Hills*, unlike *Edgerton*, faithfully applied long-standing principles of Wisconsin insurance contract law and factored into its calculus the reasonable expectations of an insured. It recognized that "The CGL policy was designed to protect an insured against liability for negligent acts resulting in damage to third parties." *Id.* **[36]** at 183-84 (quoting Arnold P. Anderson, *Wisconsin Insurance Law* § 5.14, at 136 (3d ed. 1990 & Supp. 1997)).[29]

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[28] The rule of contribution *is* an equitable rule. *See Wagner* v. *Daye*, 68 Wis. 2d 123, 125, 227 N.W.2d 688 (1975); *Hartford Accident & Indem. Co.* v. *Worden-Allen Co.*, 238 Wis. 124, 132, 297 N.W. 436 (1941). Although the right to contribution in CERCLA actions is now statutorily granted, the nature of the relief remains the same. Moreover, "The fact that an action may be founded in principles of equity, however, does not mean that the suing party does not seek monetary compensation." *Sauk County* v. *Employers Ins. of Wausau*, 202 Wis. 2d 433, 443 n.1, 550 N.W.2d 439 (Ct. App. 1996).

[29] This view has been subsequently applied by the court of appeals. *See Sauk County* v. *Employers Ins. of Wausau*, 202 Wis. 2d 433, 443, 550

¶61 The basic differences between the *Edgerton* facts the *Hills* facts are as follows: (1) *Edgerton* owned the contaminated property, *Hills* did not; (2) *Edgerton* cleaned up the damaged property, *Hills* was asked to contribute to government cleanup costs; (3) *Edgerton* was contacted directly by government, *Hills* was not; (4) *Hills* was brought into a formal lawsuit, *Edgerton* was not. The principal distinction between the *Hills* category of cases and the court of appeals' fourth category is that there was contact between the government and the insured before the insured was sued by a third party.

¶62 This distinction is arbitrary. If we were to honor this distinction, coverage for CERCLA response cost liability would turn on the fortuity of whether the insured had ever been contacted in some manner by the government regarding the remediation of a site for which the insured was a potentially responsible party. In short, government contact would mean loss of coverage.

¶63 If we were to conclude that this distinction is indefensibly arbitrary and contrary to the expectation of a [37] reasonable insured, we would realize that the principal distinction between the third category and the fourth category is that the government files suit for compensation instead of a private party. This again is fortuitous and not what a reasonable insured would expect.

¶64 It makes' little sense in determining whether "damages" have occurred under the policy whether the party bringing a legal action for contribution to remediate damaged property is a governmental agency or some other entity.[30] Certainly this distinction was not bargained for, nor

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N.W.2d 439 (Ct. App. 1996) ("*Hills* held that the purpose of CGL policies is to indemnify insureds for damage they cause to others' property.") (referring to the court of appeals decision in *Hills*, 201 Wis. 2d 1, 548 N.W.2d 100 (Ct. App. 1996), which was subsequently affirmed by this court).

[30] *See* Todd M.W. Turall, *If at First You Don't Succeed . . . Change the Facts?: New Hope for Insureds Seeking Defense and Indemnification from Insurance Companies for Environmental Cleanup Costs*, 6 Wis.

is it manifested anywhere in the CGL policies. The nature of the relief sought against an insured for damage that it caused should not change based on the identity of the claimant in a CERCLA cost recovery action.[31]

¶65 Perhaps the best example of the arbitrariness of these distinctions is illustrated by *Hills*. The defendants in the [38] underlying action in *Hills*, who were sued by the EPA for declaratory relief and recovery of response costs, would be precluded from coverage under a standard CGL policy if they were governed by *Edgerton*. They would fall into the court of appeals' category three. Meanwhile, Hills and the hundreds of other potentially responsible parties (PRPs) who were impleaded by these original defendants would receive coverage, despite the fact that the third-party complaint against them sought contribution for the same CERCLA response costs. We do not believe it is rational or equitable that an insured's coverage should depend upon the assiduousness of the government in contacting the insured as a potentially responsible party. In a cost recovery action under CERCLA, the EPA is not required to sue all PRPs, nor is it required to locate or contact all PRPs at earlier stages in the remediation process. *See* William T. Stuart, Comment, *City of Edgerton: Creating a Friendlier Forum for Insurance Companies*, 80 Marq. L. Rev. 853, 873 (1997).[32]

Envtl. L.J. 119, 140 (1999) ("To an insured [facing liability under CERCLA], there is no real difference between being sued by another party and being sued by a government agency.").

[31] We doubt that *Edgerton* contemplated the consequences of this artificial distinction. In *Edgerton*, the majority compared cost recovery actions under § 107(a)(4)(A) with natural resource damages claims under § 107(a)(4)(C), the latter of which the court acknowledged were "damages." *Edgerton*, 184 Wis. 2d at 784-85. However, only the government can bring a natural resource damages claim under this subsection. *See* 42 U.S.C. § 9607(f)(1). Yet, under the government-as-a-claimant theory propounded by the insurers, costs under § 106(a)(4)(C) actions should not be covered under the policies.

[32] A similarly odd result can be imagined under the *Edgerton* case if its facts had changed slightly, as explained by one commentator:

[39] ¶66 The interplay between *Hills* and *Edgerton* has created an exceedingly tenuous situation. We have no doubt that the court of appeals, in creating categories three and four, was attempting quite admirably to reconcile the *Hills* and *Edgerton* holdings.[33] It did so by constructing a system that did not create perverse incentives for insureds to purposefully refuse to respond to a government remediation directive, allow the pollution to go unremediated, and wait to be sued before undertaking cleanup actions, so that coverage would result. But the court's four-category schema exposed how arbitrary the distinctions are. The only sensible conclusion is that CERCLA response costs for which a party becomes liable, in whatever form that liability is pursued, are "damages" for that party's liability for prior damage to property and must be indemnified.

> The only difference in *Hills* and *Heritage* is that in those cases the DNR contacted a third party, who then was forced to file a suit to bring in *Hills* and *WPS* respectively, instead of the DNR or EPA contacting them directly. Based on this distinction, Edgerton would have been covered by its CGL (ignoring the owned-property exclusion) if the EPA and DNR had directly contacted only ES&G, and ES&G had filed a suit against Edgerton, because then the costs incurred by Edgerton would have constituted "damages" rather than response costs. In practice, this distinction seems to be irrelevant and merely technical, and may lead to insureds manipulating their situations to ensure that they will never incur response costs but will wait until a third party files a suit against them to recover "damages."

Turall, *supra*, at 138 (footnotes omitted).

[33] We also note that the Seventh Circuit of the United States Court of Appeals provided a cogent analysis and basis for its decision in *Wisconsin Power & Light Co.* v. *Century Indemnity Co.*, 130 F.3d 787 (7th Cir. 1997). The court concluded that if the costs an insured would incur in response to a government directive to clean up land would not be recoverable "damages," then when the insured ignores the request and is thereafter sued by another party for contribution in the costs of remediating that land, no coverage should follow. *Id.* at 792. If coverage did obtain, the uncovered response costs could be transmuted into legal damages. *Id.* This is the category four scenario.

[40] ¶67 An especially disconcerting result of the nearly decade-old *Edgerton* line of cases is that the categorization scheme for determining liability coverage is now well removed from the language of the insurance contract.[34] The source of this problem can be traced to *Edgerton*'s failure to comport with the broad language of Johnson Controls' CGL policy and with the reasonable expectations of the insured.

¶68 As stated in *Hills*, CGL polices are expected to cover liabilities incurred because of prior damage to property. *Hills*, 209 Wis. 2d at 183-84. We fail to see how the policy language signals clear limitations to the coverage afforded for these liabilities. As was well explained by the court of appeals in its decision in *Edgerton*:

> [O]nce property damage is found as a result of environmental contamination, cleanup costs should be recoverable as sums that the insured was liable to pay as the result of property damage. In this context the argument concerning the historical separation of damages and equity is not convincing . . . the insured ought to be able to rely on the common sense expectation that property damage within the meaning of the policy includes a claim which results in causing **[41]** him to pay sums of money because his acts or omissions affected adversely third parties. While such claims might be characterized as seeking "equitable relief" the [cleanup] costs are essentially compensatory damages for injury to common property and for

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[34] As Johnson Controls correctly notes, categories three and four imply a type of "intentional wrongdoing" standard to the insured's actions. However, such an exception is entirely inappropriate because it does not ask whether the act giving rise to the coverage (the contamination) was intentional. *See Loveridge* v. *Chartier*, 161 Wis. 2d 150, 166, 468 N.W.2d 146 (1991) (discussing nature of intentional acts exclusion in insurance policy). This notion also erroneously assumes there is no good faith basis for the insured to contest liability under a government directive and fails to consider that CERCLA remediation actions are frequently complex and can involve innumerable permutations of factual situations.

> that reason the insured has a duty to defend. . . . [T]he short answer is that from the standpoint of the insured damages are being sought for injury to property. It is that contractual understanding rather than some artificial and highly technical meaning of damages which ought to control.

City of Edgerton v. *Gen. Cas. Co. of Wis.*, 172 Wis. 2d 518, 543, 493 N.W.2d 768 (Ct. App. 1992) (quoting *Upjohn Co.* v. *Aetna Cas. & Sur. Co.*, 768 F. Supp 1186, 1199-1200 (W.D. Mich. 1990)).

¶69 By determining that CERCLA response costs are recoverable under these CGL policies, we are not rendering the "as damages" phrase a mere surplusage. *Edgerton*, 184 Wis. 2d at 784 (citing *Shorewood*, 170 Wis. 2d at 369-70). On the contrary, the language of these CGL policies still precludes coverage for costs that the insured would pay in order to comply with general government regulations or prospective conduct. *See, e.g., A.Y. McDonald Indus., Inc.* v. *Ins. Co. of N. Am.*, 475 N.W.2d 607, 625-26 (Iowa 1991); *Bausch & Lomb Inc.* v. *Utica Mut. Ins. Co.*, 625 A.2d 1021, 1033 (Md. 1993); *Minnesota Mining*, 457 N.W.2d 175, 180 n.4; *see also Wis. Power & Light Co.* v. *Century Indem. Co.*, 130 F.3d 787, 791 (7th Cir. 1997) ("A claim for damages must be distinguished from a demand for compliance with a legal duty.").

¶70 In deciding the *Edgerton* case, the court relied on two federal decisions to hold that CERCLA response costs are not "damages" under CGL policies. *Edgerton*, 184 Wis. 2d at 784 **[42]** (citing *Maryland Cas. Co.* v. *Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987) (applying Maryland law), *cert. denied*, 484 Ú.S. 1008 (1988), and *Cont'l Ins.* v. *Northeastern Pharm. & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988) (*NEPACCO*) (applying Missouri law), *cert. denied sub nom. Missouri* v. *Cont'l Ins. Cos.*, 488 U.S. 821 (1988)). The *Armco* and *NEPACCO* decisions have since been rejected by the highest courts of the states whose laws the decisions were attempting to apply. *See Farmland Indus., Inc.* v. *Republic Ins. Co.*, 941 S.W.2d 505, 512 (Mo. 1997); *Bausch &*

Lomb Inc. v. *Utica Mut. Ins. Co.*, 625 A.2d 1021 (Md. 1993).[35] This fact is not dispositive, but it erodes the credibility of the original *Edgerton* decision.

¶71 We conclude that the *Edgerton* decision was incorrect insofar as it relied on the too-confining, overly technical definition of "damages" in *Shorewood* and held that CERCLA response costs were not damages within the terms of the standard CGL policy.

B. Do PRP Letters Trigger the Insurer's Duty to Defend?

¶72 Having determined that CERCLA response costs for restoring and remediating contaminated property should have been determined to be "damages" under the relevant CGL policies, we **[43]** turn to the other holding in *Edgerton*: that the receipt of a potentially responsible party (PRP) letter from the EPA, or a similar letter from a state agency, does not constitute a "suit" for which an insurer has a duty to defend.

¶73 The *Edgerton* court stated the problem in the following manner:

> The expansive authority granted to state and federal agencies under CERCLA, in order to initiate environmental cleanup of hazardous waste, has had the effect of producing a flood of litigation so as to determine who will pay the cleanup costs—the PRP or the PRP's insurer. . . . [T]here has been no definitive, nationwide resolution of the ultimate issue—whether the general comprehensive liability policy—the "CGL"—imposes a duty to defend a federal or state demand for environmental remediation and cleanup costs. Instead, courts

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[35] *NEPACCO* itself was a sharply divided Eighth Circuit en banc decision that reversed an earlier panel decision. *Cont'l Ins. Cos.* v. *Northeastern Pharm. & Chem. Co.*, 811 F.2d 1180 (8th Cir. 1987). The Eighth Circuit has subsequently rejected the rationale of the second *NEPACCO* decision. *See Lindsay Mfg. Co.* v. *Hartford Accident & Indem. Co.*, 118 F.3d 1263, 1270-71 (8th Cir. 1997) (predicting Nebraska law).

have developed competing definitions of what constitutes a "suit" when environmental cleanup is required.

Edgerton, 184 Wis. 2d at 766-68.

¶74 The court went on to observe that:

Some courts have concluded that PRP letters have a unique nature within the context of a CERCLA administrative proceeding. These courts have held that the receipt of PRP letters is the "functional equivalent of a suit" because (a) the letters maintain a confrontational and adversarial posture, and (b) they create the spectre of devastating financial consequences if voluntary cooperation is not forthcoming. As a result, PRP liability for immediate and long-range cleanup and remediation costs necessitates a legal defense.

Id. at 770.

¶75 Then the court provided its own answer:

We conclude that neither a PRP letter nor a comparable notification letter by a state agency such as the DNR triggers the insurers' duty to defend.

[44] . . . .

[T]he primary attribute of a "suit" is that parties to an action are involved in actual court proceedings, initiated by the filing of a complaint. . . . [D]efinitions of suit or legal process all involve a court action.

. . . .

We find no ambiguity in the term "suit" as it has been used in the insurance policies. "Suit" denotes court proceedings, not a "functional equivalent." The dissent believes that a reasonable policyholder would view letters from a federal or state agency advising an insured of liability as a "suit." To the contrary, the word "suit" is easily

> understood and unambiguous to a reasonable policyholder. The proof is in the decisions that hold that a "PRP letter" is the "functional equivalent of a suit." Either there is a suit or there is not. When there is no suit, there is no duty to defend.

Id. at 771, 775, 781.

¶76 The *Edgerton* court's definition of "suit" gives us pause. An insurance policy is a contract between parties, and it is normally not the province of the court to enlarge the terms of a policy the parties have agreed upon. At the same time, the specific term being applied needs to be put in context.

¶77 Comprehensive general liability policies not only provide protection to insureds through indemnification for damages for which the insured becomes liable, but also for defense costs. John N. Bolus, *Contractual Liability Insurance Provisions: Overview, in Reference Handbook on the Comprehensive General Liability Policy: Coverage Provisions, Exclusions, and Other Litigation Issues* 43 (Peter J. Neeson ed. **[45]** 1995). A literal definition of the term "suit" in the CGL policy presents some practical difficulties in understanding and reconciling the obligations of the parties in the presence of a CERCLA claim.

¶78 For instance, the CGL policy imposes duties upon the insured. The standard policy has long required that the insured provide notice to the insurer as soon as practicable. The 1973 version of the policy provides:

> In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.

Dorothy Dey & Susan Ray, *Annotated Comprehensive General Liability Policy* § 3-1, 41 (1985).

¶79 A second provision of the CGL policy requires the insured to immediately forward process to the insurer: "If a claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative." Dey, *supra*, at § 3-2, 44.

¶80 This CGL policy language is reinforced in two statutes. *See* Wis. Stat. §§ 631.81, 632.26 (2001-02). These two sections "govern the notice provisions in Wisconsin insurance policies and set out the rights and duties of the insured and the insurer." *Neff* v. *Pierzina*, 2001 WI 95, ¶30, [46] 245 Wis. 2d 285, 629 N.W.2d 177. They have been a part of Wisconsin law for more than a half-century.

¶81 A third provision in the CGL policy imposes a duty on the insured to cooperate in the event of an occurrence, claim, or suit:

> The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing the giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

Dey, *supra*, at § 3-3, 45.[36]

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[36] In *Chemical Applications Co., Inc.* v. *Home Indemnity Co.*, 425 F. Supp. 777 (D. Mass 1977), a pre-CERCLA case under the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1321(f)(2), the court decided that the insured's costs in cleaning up an oil spill in navigable waters was covered property damage. *Id.* at 778-79. It also concluded that the insured, who under governmental and public pressure cleaned up the spill

¶82 The CGL policy then addresses the insurer's duty to defend. The relevant clause in the policy provides that the insurer "shall have the right and duty to defend any suit against the insured seeking damages." This language appears to imply an equivalency between the insurer's "right" and the **[47]** insurer's "duty." The insurer's "right" is partially defined in the previously noted duties imposed on the insured.

¶83 "[T]he duty to defend is generally acknowledged to be *broader than the insurance company's duty to pay . . . .*" Bolus, *supra*, at 43 (emphasis added). "Generally, the duty to defend is *broader than the duty to indemnify*." Arnold P. Anderson, *Wisconsin Insurance Law* 212 (3d ed. 1990) (citing *Colton* v. *Swain*, 527 F.2d 296 (7th Cir. 1975)) (emphasis added).

¶84 When the CGL policy requires and the insurer insists upon notice and cooperation from the insured, and when the insurer's duty to defend is generally broader than its duty to pay, how is the insurer entitled to assert that it has no duty to defend until an actual suit has been filed? When an insurer has received a copy of the insured's PRP letter, it has become familiar with the nature of the claim. Faced with a PRP letter, which can lead to drastic consequences, including higher costs, and which has been shared with the insurer, the reasonable insured is likely to *expect* reciprocal cooperation from the insurer in the form of a defense.

¶85 A tender of defense occurs when the insurer has notice that there is a claim against the insured. *Towne Realty, Inc.* v. *Zurich Ins. Co.*, 201 Wis. 2d 260, 264, 548 N.W.2d 64 (1996). "A tender of defense occurs once an insurer has been put on notice of a claim against the insured. This approach 'discourages the insurer . . . from defaulting in

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without the insurer's prior consent, did not breach the "cooperation clause." Dorothy H. Dey, Defense Research Institute, *Annotated CGL Policy*, § 3-3, at 45 (1984).

the performance of its duty to defend.'" *Id.* at 267 (quoting *White Mountain Cable Constr.* v. *Transamerica*, 631 A.2d 907, 910 (N.H. [48] 1993)). "If there is any doubt about the duty to defend, it must be resolved in favor of the insured." *Towne Realty*, 201 Wis. 2d at 269 (quoting *Shorewood*, 170 Wis. 2d at 364). In short, we might look at the language of the CGL policy and conclude that, in the context of a PRP letter from the EPA or a similar letter from a state agency, a reasonable person in the position of the insured would expect the insured to provide a defense.

¶86 As *Edgerton* noted, other courts have attacked the problem in a different way after analyzing the unique system of liability under CERCLA. CERCLA was designed not only to require that responsible parties pay for the costs of responding to contaminated property but also to encourage parties to undertake these remediation efforts without litigation and in conjunction with other PRPs for the particular site at issue. *See* 42 U.S.C. § 9622(a), (e). The EPA's practice is to use PRP letters to achieve the goal of remediating environmental contamination, rather than to bring suit immediately upon identifying a polluter. *See EDO Corp.* v. *Newark Ins. Co.*, 898 F. Supp. 952, 960 (D. Conn. 1995). Of course, nothing prohibits the EPA from remediating properties itself and then commencing a cost recovery action naming the insured. In these circumstances, the "suit" condition has undoubtedly been met.

¶87 The existence of a statutory system designed to forgo litigation, while achieving the same relief, minimizes the distinction between administrative claims and formal legal proceedings. *See Aetna Cas. & Sur. Co.* v. *Pintlar Corp.*, 948 [49] F.2d 1507, 1517 (9th Cir. 1991) ("Coverage should not depend on whether the EPA may choose to proceed with its administrative remedies or go directly to litigation.").[37]

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[37] We strictly limit our conclusion regarding the triggering effect of a PRP letter on a CGL insurer's duty to defend to the CERCLA context.

¶88 Because of this strong policy in favor of cooperative remediation over litigation, CERCLA provides within its enforcement mechanism significant incentives for prompt and full involvement from all contacted PRPs. Failure to actively engage the EPA following a PRP letter can lead to such adverse consequences as (1) large fines that may include treble punitive damages; (2) an inadequate administrative record affecting the insured's interests; (3) use of the insured's non-compliance against the insured in the apportionment of cleanup costs in subsequent litigation; (4) forfeiture of special rights against latter actions for contribution of response cost payments; and (5) other parties (including perhaps the EPA) cleaning up the site at a higher cost, which will latter be demanded of the insured. *See Quaker State Minit-Lube, Inc.* v. *Fireman's Fund Ins. Co.*, 868 F. Supp. 1278, 1308 (D. Utah 1994); *see also Pintlar*, 948 F.2d at 1516; *Mich. Millers Mut. Ins. Co.* v. *Bronson Plating Co.*, 519 N.W.2d 864, 872 (Mich. 1994).

¶89 PRP notice letters expose an insured to agency action that is not inconsequential to its liability interests. In this case, if Johnson Controls had refused to respond to these letters and refused to become involved in remediation efforts **[50]** with the EPA or comparable state agencies, then, inevitably, the cleanup and remediation work would have been done by the EPA, the state agencies, or by settling responsible parties, any of whom could have sued Johnson Controls for its share of the costs. PRP letters, which are more analogous to a civil complaint than traditional demand letter, alerted Johnson Controls that the EPA had begun a legal process to conclusively and legally determine the appropriate "response activities" that liable parties must perform or pay for to abate the pollution at the sites in question. *See Pintlar*, 948 F.2d at 1516; *Hazen Paper Co.* v. *U.S. Fid. & Guar. Co.*, 555 N.E. 2d 576, 581 (Mass. 1990).

¶90 This is why many courts have concluded that a PRP letter is so adversarial that it constitutes the functional equivalent of a suit and triggers the insurer's duty to defend.

In the absence of such a conclusion, the insured has a perverse incentive not cooperate with government remedial actions until the EPA or a state agency files a civil action in court "to force the insured's compliance with CERCLA." *Quaker State*, 868 F. Supp. at 1307. Deliberate non-compliance for the purpose of obtaining a defense from the insurer is completely contrary to public policy.

¶91 In her dissent in *Edgerton*, Justice Abrahamson wrote:

> From the point of view of a reasonable policy holder, official letters from a federal or state agency advising an insured of liability, with increasing penalties if the insured does not respond, appear to be an adversary's attempt to gain an end by a legal process. Such administrative proceedings may [51] force the insured to hire technical experts and lawyers to protect its interests and may terminate in an action in court. Thus to the insured an administrative action is as coercive a legal process as an action filed in a court of law.

Edgerton, 184 Wis. 2d at 789 (Abrahamson, J., dissenting). This analysis supports both a reasonable-expectation-of-the-insured theory and a functional-equivalent-of-a-suit theory.

¶92 We conclude that insurers have a duty to defend an insured who receives a PRP letter from the EPA or an equivalent state agency seeking remediation or remediation costs, provided the insured has coverage for the claim under the CGL policy. As noted above, CERCLA response costs are not excluded by the "as damages" clause but may be excluded by other provisions of the policy.

IV

¶93 We have articulated several reasons why we believe that *Edgerton* incorrectly applied Wisconsin law on insurance contracts and remedies, misconstrued the nature of CERCLA liability, and, thereby, erroneously denied coverage to policyholders of standard CGL policies. Nevertheless, it is not sufficient for this court merely to

explain why we disagree with the *Edgerton* decision and reach a contrary conclusion. Our duty is particularly clear here, because numerous litigants in Wisconsin have previously had coverage disputes determined under the principles set out in *Edgerton*. Overruling *Edgerton* requires a compelling justification. *See State* v. *Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶71, 244 Wis. 2d 613, 628 **[52]** N.W.2d 376 (Crooks, J., concurring). We conclude that such a justification exists.

A. Stare Decisis

¶94 This court follows the doctrine of stare decisis scrupulously because of our abiding respect for the rule of law. *See City of Akron* v. *Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419-20 (1983). We understand that respect for prior decisions is fundamental to the rule of law. We recently summarized this court's adherence to the doctrine, stating:

> Fidelity to precedent ensures that existing law will not be abandoned lightly. When existing law "is open to revision in every case, 'deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.'" Consequently, this court has held that "any departure from the doctrine of stare decisis demands special justification."

Schultz v. *Natwick*, 2002 WI 125, ¶37, 257 Wis. 2d 19, 653 N.W.2d 266.[38] "A court's decision to depart from precedent is not to be made casually. It must be explained carefully and fully to insure that the court is not acting in an arbitrary

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[38] Citing, respectively: *State* v. *Stevens*, 181 Wis. 2d 410, 441, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring), *cert. denied*, 515 U.S. 1102 (1995); *State* v. *Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶29, 244 Wis. 2d 613, 628 N.W.2d 376 (quoting *Citizens Util. Bd.* v. *Klauser*, 194 Wis. 2d 484, 513, 534 N.W.2d 608 (1995) (Abrahamson, J., dissenting)); *State* v. *Ferron*, 219 Wis. 2d 481, 504, 579 N.W.2d 654 (1998) (quoting *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)).

or capricious manner. A court should not depart from precedent without sufficient justification." *State* v. *Stevens*, 181 Wis. 2d 410, 442, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring).

[53] ¶95 The rationales for following the doctrine of stare decisis are familiar. They include:

> [1] the desirability that the law furnish a clear guide for conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; [2] the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [3] the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). "Stare decisis is the preferred course of judicial action because it promotes evenhanded, predictable, and consistent development of legal principles . . . and contributes to the actual and perceived integrity of the judicial process." *State* v. *Ferron*, 219 Wis. 2d 481, 504, 579 N.W.2d 654 (1998) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991)). The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed. *See Stevens*, 181 Wis. 2d at 442 (Abrahamson, J., concurring) (citing *Welch* v *State Farm Mut. Auto. Ins.*, 122 Wis. 2d 172, 182, 361 N.W.2d 680 (1985) (Steinmetz, J., dissenting)). In addition, frequent and careless departure from prior case precedent undermines confidence in the reliability of court decisions. *See State* v. *Lindell*, 2001 WI 108, ¶169, 245 Wis. 2d 689, 629 N.W.2d 223 **[54]** (Abrahamson, C.J., dissenting).[39] The reasons for

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[39] As this court has stated, "When legal standards 'are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results.'" *State* v. *City of Oak Creek*, 2000 WI 9, ¶55 n.27, 232 Wis. 2d 612, 605 N.W.2d 526 (quoting *Appeal of Concerned Corporators of Portsmouth Savings Bank*, 525 A.2d 671, 701

rejecting any established rule of law must always be weighed against these factors.

¶96 At the same time, there are particular circumstances in which a jurisdiction's highest court should not be barred from pursuing a sound and prudent course for the sake of upholding its prior precedent. Although special justification is required to overturn prior decisions, *see, e.g.*, *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000); *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991), justification can be divined in the appropriate circumstances. *See Cook* v. *Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997) ("stare decisis contemplates that under limited circumstances a court may overrule outdated or erroneous holdings"). Consequently, stare decisis is not a mechanical formula for adherence to the latest decision, *Payne*, 501 U.S. at 828, and "the power of the court to repudiate its prior rulings is unquestioned, though not often exercised." *Schwanke* v. *Garlt*, 219 Wis. 367, 371, 263 N.W. 176 (1935).

[55] ¶97 In all, stare decisis is a principle of policy, not an inexorable command. *Hohn* v. *United States*, 524 U.S. 236, 251 (1998).[40] It reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

¶98 With this understanding of our responsibility as a judicial institution, we inquire into the circumstances that satisfy the demanding standards for departing from precedent. There are several familiar criteria in Wisconsin for overturning prior cases. *Stevens*, 181 Wis. 2d at 442

(N.H. 1987) (Souter, J., dissenting) (quoting *Thornburgh* v. *Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 786-87 (1986) (White, J. , dissenting))).

[40] *See also, e.g., State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997); *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991).

(Abrahamson, J., concurring). First, changes or developments in the law have undermined the rationale behind a decision. *Id.* Second, there is a need to make a decision correspond to newly ascertained facts. *Id.* Third, there is a showing that the precedent has become detrimental to coherence and consistency in the law. *Id.*

¶99 Among the additional relevant considerations in determining whether to depart from stare decisis are whether the prior decision is unsound in principle, whether it is unworkable in practice, and whether reliance interests are implicated. *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 783 (1992); *see also Planned Parenthood of S.E. Pa.* v. *Casey*, 505 U.S. 833, 854-55 (1992) (joint opinion of O'Connor, Kennedy, **[56]** and Souter, JJ.). As noted by the lead opinion in *Outagamie County*, 244 Wis. 2d 613, the decision to overrule a prior case may turn on whether the prior case was correctly decided and whether it has produced a settled body of law. *Id.*, ¶30 (citing *Casey*, 505 U.S. at 999 (Scalia, J., concurring in part and dissenting in part)).

¶100 It is not a sufficient reason for this court to overrule its precedent that a large majority of other jurisdictions, with no binding authority on this court, have reached opposing conclusions.[41] This court has no

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[41] For state cases that have held contrary to *Edgerton*, see *Alabama Plating Co.* v. *U.S. Fid. & Guar. Co.*, 690 So.2d 331 (Ala. 1996); *Compass Ins. Co.* v. *City of Littleton*, 984 P.2d 606 (Colo. 1999); *Atlantic Wood Indus., Inc.* v. *Lumbermen's Underwriting Alliance*, 396 S.E.2d 541 (Ga. App. 1990); *Outboard Marine Corp.* v. *Liberty Mut. Ins. Co.*, 607 N.E.2d 1204 (Ill. 1992); *Hartford Accident & Indem. Co.* v. *Dana Corp.*, 690 N.E.2d 285 (Ind. App. 1997); *A.Y. McDonald Indus., Inc.* v. *Ins. Co. of N. Am.*, 475 N.W.2d 607 (Iowa 1991); *Aetna Cas. & Sur. Co.* v. *Nuclear Eng'g Co.*, 2002 WL 363373 (Ky. App. 2002) (opinion not yet final); *Bausch & Lomb Inc.* v. *Utica Mut. Ins. Co.*, 625 A.2d 1021 (Md. 1993); *Hazen Paper Co.* v. *U.S. Fid. & Guar. Co.*, 555 N.E.2d 576 (Mass. 1990); *U.S. Aviex Co.* v. *Travelers Ins. Co.*, 336 N.W.2d 838 (Mich. App. 1983); *Minn. Mining & Mfg. Co.* v. *Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990); *Farmland Indus., Inc.* v. *Republic Ins. Co.*, 941 S.W.2d 505 (Mo. 1997); *Coakley* v. *Maine Bonding & Cas. Co.*, 618 A.2d 777 (N.H. 1992); *Morton Int'l, Inc.* v.

Gen. Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993); *C.D. Spangler Const. Co.* v. *Indus. Crankshaft & Eng'g Co., Inc.*, 388 S.E.2d 557 (N.C. 1990); *Sanborn Plastics Corp.* v. *St. Paul Fire & Marine Ins. Co.*, 616 N.E.2d 988 (Ohio App. 1993); *Lane Elec. Coop., Inc.* v. *Federated Rural Elec. Ins. Corp.*, 834 P.2d 502 (Or. App. 1992); *Boeing Co.* v. *Aetna Cas. & Sur. Co.*, 784 P.2d 507 (Wash. 1990); *Compass Ins. Co.* v. *Cravens, Dargan & Co.*, 748 P.2d 724 (Wyo. 1988).

[57] In addition to these state court decisions, numerous federal courts, applying state law, have also determined that CERCLA response costs are "damages" under liability insurance policies. *See Gerrish Corp.* v. *Universal Underwriters Ins. Co.*, 947 F.2d 1023 (2d Cir. 1991) (applying Vermont law); *SnyderGeneral Corp.* v. *Century Indem. Co.*, 113 F.3d 536 (5th Cir. 1997) (applying Texas law); *Lindsay Mfg. Co.* v. *Hartford Accident & Indem. Co.*, 118 F.3d 1263 (8th Cir. 1997) (applying Nebraska law); *Aetna Cas. & Sur. Co., Inc.* v. *Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991) (applying Idaho law); *MAPCO Alaska Petroleum, Inc.* v. *Cent. Nat. Ins. Co. of Omaha*, 795 F. Supp. 941 (D. Alaska 1991); *Chesapeake Utils. Corp.* v. *Am. Home Assur. Co.*, 704 F. Supp. 551 (D. Del. 1989); *Potomac Elec. Power Co.* v. *Cal. Union Ins. Co.*, 777 F. Supp. 968 (D. D.C. 1991); *GAF Corp.* v. *Cont'l Cas. Co.*, 1989 WL 1761 (E.D. La. 1989); *Nat'l Indem. Co.* v. *U.S. Pollution Control, Inc.*, 717 F. Supp. 765 (W.D. Okla. 1989); *Fed. Ins. Co.* v. *Susquehanna Broad. Co.*, 727 F. Supp. 169 (M.D. Pa. 1989); *Quaker State Minit-Lube, Inc.* v. *Fireman's Fund Ins. Co.*, 868 F. Supp. 1278 (D. Utah 1994); *Morrow Corp.* v. *Harleysville Mut. Ins. Co.*, 101 F. Supp. 2d 422, 434 (E.D. Va. 2000).

Presently, only the Supreme Courts of Maine and California maintain a result somewhat consistent with that of *Edgerton*, whereby CERCLA response costs are not considered "damages" under CGL policies. However, even the courts in these states, while reaching the same result of denying coverage as found in *Edgerton*, have not followed the rationale of *Edgerton*. When Maine reached its conclusion that the phrase "as damages" in CGL policies did not include CERCLA response costs, it relied in part on that state's prior legal conclusion that such language would not cover the costs of punitive damages. *Patrons Oxford Mut. Ins. Co.* v. *Marois*, 573 A.2d 16, 19 n.8 (Me. 1990). Wisconsin courts have held to the contrary on the issue of whether punitive damages are covered "damages" under a CGL policy, unless explicitly excluded. *See Brown* v. *Maxey*, 124 Wis. 2d 426, 443, 369 N.W.2d 677 (1985).

California law has struggled with the issues at play in this case. *See Foster-Gardner, Inc.* v. *Nat'l Union Fire Ins. Co.*, 959 P.2d 265 (Cal. 1998); *AIU Ins. Co.* v. *Superior Court*, 799 P.2d 1253 (Cal. 1990); *Aerojet-General Corp.* v. *Superior Court*, 257 Cal. Rptr. 621 (Cal. Ct. App. 1989). In a 2001 decision, the California Supreme Court reached the somewhat unique conclusion that CERCLA response costs are not covered because,

apprehension [58] about being a solitary beacon in the law if our position is based on a sound application of this state's jurisprudence. But when our light is dim and fading, then this court must be prepared to make correction. Stare decisis is neither a straightjacket nor an immutable rule. *See Carpenters Local Union No. 26* v. *U.S. Fid. & Guar. Co.*, 215 F.3d 136, 142 (1st Cir. 2000). We do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision.

B. Stare Decisis and *Edgerton*

¶101 Given these principles of stare decisis and the criteria for permitting deviation from the doctrine, we conclude that the *Edgerton* decision cannot remain the law. In applying the criteria for contravening stare decisis, we note that many of the reasons given earlier in this opinion explain why *Edgerton* must be overruled.

[59] ¶102 We first observe that the present case is not solely about *Edgerton*. It is about the interplay of *Edgerton* with our subsequent unanimous decision in *Hills*. The categories established in *Johnson Controls I* are derivative of these two decisions and the conflict between them. Although *Hills* purported to retain *Edgerton* in its totality, it severely undercut the rationale by which the *Edgerton* court denied relief to insureds in circumstances quite comparable to those in *Hills*.

¶103 *Edgerton* held without qualification that CERCLA response costs aimed at remediating contaminated property do not constitute damages for which coverage is required under standard CGL policies. *Edgerton*, 184 Wis. 2d at 782. Three years later, this court

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since there is no duty to defend without a formal suit and because the duty to defend is broader than the duty to indemnify, there can be no duty to defend if there is no duty to indemnify. *Certain Underwriters at Lloyd's of London* v. *Superior Court*, 16 P.3d 94, 102 (Cal. 2001). This decision apparently encourages insureds to wait and be sued before remediating property, if they wish to receive liability insurance coverage.

held in *Hills* that an insurer must defend an action against its insured by a third party seeking to recover costs it expended under CERCLA to clean up land that had been damaged by the insured. *Hills*, 209 Wis. 2d at 185. In reaching this latter conclusion, we clearly stated: "It has long been the law of this state that the cost of repairing and restoring damaged property and water to its original condition is a proper measure of compensatory damages. . . . The passage of CERCLA and similar state statutes has not changed the law of remedies." *Id.* at 181-82. As a result of this holding, an insured's liability for certain CERCLA response costs *were* deemed to be "damages" under a standard CGL policy. *Hills* recast the nature of the relief sought in actions involving CERCLA response costs. This recasting correctly perceived the nature of liability in these cases, but was squarely at odds with *Edgerton*'s **[60]** misapplication of Wisconsin law on the remediation of damaged property.

¶104 *Hills*' correction of *Edgerton* was complemented by another consideration. *Hills* heeded the reasonable expectations of the insured when it assessed whether the damages at issue were covered under the CGL policies. *Hills*, 209 Wis. 2d at 183-84; *see also Johnson Controls II*, 250 Wis. 2d 319, ¶17 n.4. In contrast to *Edgerton*, the *Hills* court stated:

> [B]ecause liability policies are intended to protect insureds from negligent acts resulting in damage to third parties, "an insured, when buying comprehensive general liability coverage, expects that *any* activity resulting in unintended and unexpected . . . property damage to a third party will be covered unless it is specifically excluded."

Id. at 184 (quoting Robert D. Chesler et al., *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 Rutgers L.J. 9, 69-70 (1986), with emphasis added by the *Hills* opinion).

¶105 Still, *Hills* openly endeavored to retain *Edgerton*'s holdings in some manner. *Hills*, 209 Wis. 2d at 180, 182, 185.

However, in straining to preserve *Edgerton*, *Hills* only deferred the inevitable decision this court makes today. In one sense, therefore, the decision to overrule *Edgerton* is eased by the clear conclusion that *Hills* and *Edgerton* cannot be reconciled without generating the arbitrary and illogical distinctions discussed earlier in this opinion. As a practical matter, if we do not remove or limit the force of *Edgerton*, we must remove or **[61]** limit the force of *Hills*.[42] Because *Hills* undermined the doctrinal underpinnings of *Edgerton*, the prior decision is more apt to be overruled. *See Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989).

¶106 Perhaps the most damning factor weighing against our continued adherence to *Edgerton* is its failure to provide suitable direction and consistency to this area of the law. Without this consistency, one of the primary justifications for adhering to stare decisis dissolves. *See City of Milwaukee* v. *Firemen's Relief Ass'n of City of Milwaukee*, 42 Wis. 2d 23, 37-38, 165 N.W.2d 384 (1969) ("the state of precedent on this subject is so contradictory that we conclude . . . that the diverse nature of past holdings leaves us free to repudiate the **[62]** less desirable rulings and from the obligation to determine this case solely on the basis of stare decisis").

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[42] *Hills*' inconsistency with *Edgerton* is witnessed by a statement from one commentator who, while lauding the *Edgerton* decision shortly after it was made, failed to correctly predict the outcome in *Hills*. According to this commentator:

> Since *Edgerton* analyzed the nature of the relief, its holding is not limited solely to landfill cases under CERCLA or equivalent state statutes. Nor is it limited to government-ordered cleanups. Rather, the holding applies to all environmental cases involving restitutionary or injunctive relief *regardless of whether the suit is brought by the government or a third-party as a claim contribution.*

Heidi L. Vogt, *City of Edgerton* v. *General Casualty Company of Wisconsin: A Landmark Decision in Wisconsin Insurance Coverage Law*, 68 Wis. Law. 10, 12 (May 1995) (emphasis added). *Hills* later clearly held to the contrary of this reasonable forecast with respect to a third-party suit for contribution of CERCLA response cost payments.

¶107 Nonetheless, the insurers claim that *Hills* coherently established principle whereby a reasonable insured would expect coverage for actions brought by non-governmental third parties but would not expect coverage for actions brought by the government, even if both actions were to command the insured to perform the same repairs or make the same payments to remediate the same damaged property. They point to the following language from *Hills*:

> [A] reasonable insured in the position of Hills would interpret the phrase "as damages" to include coverage for a claim, *brought by parties other than the EPA or DNR*, which obligates him or her to pay monetary sums because of the negligent contamination of property that does not fit within the owned-property exclusion, since this is the very reason that an individual purchases liability coverage.

Hills, 209 Wis. 2d at 185 (emphasis added). In making this statement, *Hills* did not conclude that the nature of the relief sought changes based on the identity of the party bringing the action. The opinion merely concluded that the DNR and EPA, when parties in a CERCLA cost recovery action, are somehow different from other parties. This observation, for the reasons discussed above, is not tenable as a rule of law. There is a logical inconsistency in granting coverage for the so-called "category two" cases (*Hills*) while not finding coverage in the remaining three categories. To the extent there is any coherence or workability, it is the function of following an arbitrary **[63]** distinction unsupported by the law, by logic, or by the language of the policies.

¶108 In *Wilcox* v. *Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965), this court overruled *Bain* v. *Northern Pacific Railway Co.*, 120 Wis. 412, 98 N.W. 241 (1904), and succeeding cases which had held that the proper choice of

law rule in Wisconsin is invariably lex loci delicti.[43] The reasoning the court used to alter the rule previously established by these cases has a striking parallel to the reasoning in this case. In *Wilcox*, we noted that the rule of lex loci had not produced certainty of result, such that "hard cases [ ] produced deviations from the rule." *Wilcox*, 26 Wis. 2d at 622. Continuing, the court opined:

> It appears therefore that lex loci has not provided a "fixed star" but rather has been merely a point of departure in hard cases. . . . "[C]ontinued adherence to a bad rule is a high price to pay for predictability. Furthermore, it is doubtful whether a bad rule will provide predictability since the courts will be inclined to engraft exceptions upon it."

Id. at 624-25 (quoting Willis Reese, *Comments on Babcock* v. *Jackson*, 63 Colum. L. Rev. 1251, 1254 (1963)).

¶109 As did *Bain* in the contex of choice of law theories, *Edgerton* "has not produced the certainty that stare decisis **[64]** contemplates," *Wilcox*, 26 Wis. 2d at 625, in the context of CGL insurance coverage for CERCLA liability. *See* Stuart, *supra*, at 876 (1997) ("criticisms [of *Edgerton*] lead to a movement in the Wisconsin appellate courts to restrict the application of the decision to the facts of the case"). Not only are the now-dispositive factual issues in these cases arbitrary, but the rule seems to generate a tertiary level of questions yet to be resolved by the courts. First, "Did the [*Hills*] court intentionally distinguish between receiving a letter from the EPA or DNR and being sued by the EPA or DNR when it stated, '*Edgerton* continues to stand for the proposition that receipt of a letter from the EPA or DNR requesting a party to propose a remediation plan does not

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[43] Lex loci delicti is a choice of law principle in tort cases which states that the right to bring an action vests at the place of injury, and courts therefore should apply the law of that place. *See* Shirley A. Wiegand, *Officious Intermeddling, Interloping Chauvinism, Restatement (Second), and Leflar: Wisconsin's Choice of Law Melting Pot*, 81 Marq. L. Rev. 761, 761 (1998).

constitute a suit seeking damages'?" Todd M.W. Turall, *If at First You Don't Succeed . . . Change the Facts?: New Hope for Insureds Seeking Defense and Indemnification from Insurance Companies for Environmental Cleanup Costs*, 6 Wis. Envtl. L.J. 119, 139 (1999). Second, what type of contact by a government agency must occur and what must the subject matter of the contact be in order to alter the insured's rights to liability coverage under its CGL policies? Third, does it matter whether the insured fully complied with a government directive that does not request immediate remedial action, and then the insured is sued in a cost recovery action? Fourth, what if a portion of third-party response costs is incurred before an insured received a cleanup demand relating to that property? Fifth, can an insured ever have a good faith basis for contesting liability and, on that basis, refuse to **[65]** take immediate action? These questions, and perhaps many more, are the offspring of the *Edgerton/Hills* system, at least as interpreted by the court of appeals.

¶110 While the insurers and several amici curiae arguing before this court fervently maintain that court of appeals and circuit court decisions exhibit an ease reconciling the *Hills* decision with *Edgerton*, the cases themselves belie that notion. The court of appeals has not been uniform in its interpretation and application of *Edgerton* and *Hills*.[44] In fact, judges on the **[66]** court of

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[44] *Compare Robert E. Lee & Assocs., Inc.* v. *Peters*, 206 Wis. 2d 509, 521, 557 N.W.2d 457 (Ct. App. 1996) ("the effect of *Edgerton* is not to deny any and all coverage to an insured whenever a case involves contaminated property"); *Sauk County*, 202 Wis. 2d at 442 ("We are not persuaded by [the insurer's] argument that because the counterclaims are premised upon contribution and indemnification theories, that the counterclaims seek merely equitable relief, which does not constitute damages pursuant to *Edgerton.")*; *Spic & Span, Inc.* v. *Cont'l Cas. Co.*, 203 Wis. 2d 118, 127, 552 N.W. 2d 435 (Ct. App. 1996) (finding that insurers had duty to defend and indemnify insured that previously occupied and controlled contaminated land for which third-parties later sued insured to recover costs of remediating that property), *with State* v. *Hydrite Chem. Co.*, 2002 WI App 222, ¶25, 257 Wis. 2d 554, 652 N.W.2d 828 (denying liability insurance

appeals have been forced to speculate over any congruence between the two decisions, without accomplishing any conclusive reconciliation. In *Johnson Controls II*, the court of appeals remarked that while *Hills'* attempted harmonization with *Edgerton* "may seem like somewhat of an arbitrary distinction to some, this is the law set by our supreme court and we are obligated to apply this law." *Johnson Controls II*, 250 Wis. 2d 319, ¶17. The court then surmised, "It is interesting to note that the difference in outcome between *Edgerton* and *Hills* may have resulted in part because in *Edgerton*, the supreme court failed to consider the expectations of the insured; whereas in *Hills*, such expectation was afforded generous consideration." *Id.*, ¶17 n.4. Alternatively, Judge Roggensack, in her dissent in *Hydrite Chemical Co.* v. *Aetna Casualty & Surety Co.*, 220 Wis. 2d 26, 582 N.W.2d 423 (Ct. App. 1998), suggested that *Hills* required only an analysis of whether the claims arose out of damage to third-party property or to the insured's owned property, with only the latter scenario being not indemnified under the CGL policies. *Id.* at 44-45 (Roggensack, J., dissenting).[45]

¶111 The confusion generated by *Edgerton* and *Hills* has been noticed nationally. In one treatise discussing how

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coverage for public nuisance claim from DNR seeking monetary damages for pollution from insured because the substance of the relief sought was to compel insured to pay for cleanup); *Amcast Indus. Corp.* v. *Affiliated FM Ins. Co.*, 221 Wis. 2d 145, 16-62, 584 N.W.2d 218 (Ct. App. 1998) (finding that *Edgerton* precluded coverage and that fundamental difference between *Edgerton* and *Hills* is not based on the ownership of the property in question but rather on whether there is a third-party claim); *Hydrite Chem. Co. v.Aetna Cas. & Sur. Co.*, 220 Wis. 2d 26, 37-39, 582 N.W.2d 423 (Ct. App. 1998) (same); *Regent Ins. Co.* v. *City of Manitowoc*, 205 Wis. 2d 450, 461, 556 N.W.2d 405 (Ct. App. 1996) ("Under ... *City of Edgerton*, an action seeking recovery of past response costs incurred by federal and state governments is not an action seeking damages.").

[45] *See also Sauk County*, 202 Wis. 2d at 441 (interpreting *Edgerton* and *Hills* as basing coverage on whether the costs are related to the contaminated property the party owns versus third-party property).

various jurisdictions have answered the question of whether cleanup [67] costs under CERCLA are "damages" coverable under CGL policies, the authors describe the surprise to the legal community caused by the *Edgerton* decision. 1 Tod I. Zuckerman & Mark C. Raskoff, *Environmental Insurance Litigation: Law and Practice*, § 3:6, at 3-182 (1996 & Supp. 2002). Speaking with candor (and in stark contrast to their less-editorial remarks concerning the law in other jurisdictions), the authors appraised the situation as follows:

> Since the Wisconsin Supreme Court's 1994 decision in *City of Edgerton v General Casualty Co*, Wisconsin law on the issue of whether cleanup costs are "damages" because of "property damage" *has been quite confusing*. . . . Thereafter, the Wisconsin Supreme Court itself began to limit the effect of its ruling in *City of Edgerton*. As a result, in Wisconsin there is coverage for *certain types* of cleanup expenses.

Id. at 3-183 (emphasis added). The commentators then proceed to discuss the four-category system articulated by the court of appeals in *Johnson Controls I* and *Johnson Controls II*. We agree with this objective assessment of the uncertainty that has developed post-*Edgerton* in Wisconsin on this issue of law.

¶112 By overruling *Edgerton*'s conclusion on the "as damages" language and adopting the *Hills* rationale, we will rectify the present confusion and arbitrariness surrounding CERCLA cost recovery actions in Wisconsin, while heading off some of the troubling issues still on the horizon. The resulting rule should be clear, comprehensive, and logical: The liability imposed under CERCLA against an insured who has contributed to the contamination of property is covered "as [68] damages" if the costs to satisfy that liability are expended to remediate, or pay for the remediation of, the damaged property, provided that the costs are not excluded by some other provision of the policy.

¶113 We note the nature of the conduct underlying these types of actions because it bears on another

consideration. As a general rule, courts will depart from stare decisis only where unintentional conduct is involved. *See Gottlieb* v. *City of Milwaukee*, 33 Wis. 2d 408, 431, 147 N.W.2d 633 (1967). "The rules of stare decisis attempt to give certainty to our law, so conduct can be planned in light of foreseeable legal consequences. Certainty, however, is less relevant in the law of unintentional torts, where conduct is not planned, than in the law of contracts or, more particularly, in the law of real property." *Wilcox*, 26 Wis. 2d at 622.

¶114 The conduct underlying the legal issues in this case involves unintentional conduct in two primary ways. First, CERCLA liability is a particular breed of strict liability *and* is retroactive without apparent limitation. In other words, CERCLA imposes liability on persons who may not have been doing anything unlawful at the time they caused the contamination. They may, in fact, have been using state-of-the-art technologies to protect against environmental damage. Liability can also be **[69]** imposed on those who did not cause contamination, but merely owned the land.[46]

¶115 Second, CGL policies were designed precisely to cover known *and unknown* hazards. *See, e.g.*, *A.Y. McDonald*, 475 N.W.2d at 621 (citing Jordan S. Stanzler & Charles A. Yuen, *Coverage for Environmental Cleanup Costs: History of the Word "Damages" in the Standard Form Comprehensive General Liability Policy*, 190 Colum. Bus. L. Rev.

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[46] *See Town of Wallkill* v. *Tesa Tape Inc.*, 891 F. Supp. 955, 961 (S.D.N.Y. 1995) ("the policy of CERCLA [is] to make generators pay their share of the cleanup costs, regardless of whether their actions were lawful at the time their hazardous materials were disposed of at the landfill"); John Copeland Nagle, *CERCLA'S Mistakes*, 38 Wm. & Mary L. Rev. 1405, 1446 & n.218 (1997); Elizabeth Ann Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 Harv. Envtl. L. Rev. 385, 430 (1988) ("CERCLA represents a change in the traditional concept of strict liability. The common law defenses to strict liability, such as state-of-the-art or lawful act at the time undertaken, are not available to CERCLA defendants.").

449, 462-65). It is thus mistaken to argue that insureds such as Johnson Controls never bargained or paid for premiums to cover the costs of complying with the [70] unique liability scheme of CERCLA.[47] CGL policies are identified by their comprehensive and inclusive nature. When CERCLA was adopted, it created strict liability not based on fault, made responsible parties joint and severally liable, and imposed liability retroactively. Therefore, neither insurers nor insureds could have bargained over coverage for the specific liability that would be imposed under such a system.

¶116 There has not been such a mass of public and private business transacted in accordance with *Edgerton* that we need to abide by stare decisis. *See United States* v. *Maine*, 420 U.S. 515, 527 (1975). We are mindful of the reliance interests of businesses, insurance companies, previous litigants (both actual and potential), and numerous others that have arisen due to this court's holding in *Edgerton*. We recognize that circuit courts and the court of appeals in this state have faithfully applied the holdings of *Edgerton*—in particular the conclusion that [71] "damages" do not mean CERCLA response costs—to the best of their ability, and that numerous cases have been decided with these principles. Because the meaning of insurance contract terms should remain settled whenever possible, we are

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[47] Similarly, Johnson Controls insurers should not be heard to argue that coverage is precluded under these policies because it was Johnson Controls' business decisions and actions that caused the pollution for which their liability arises. Such logic would work to nullify the validity of any coverage for unknown hazards and liabilities. The whole purpose of comprehensive general liability policies is to "shift the risk of unanticipated hazards from the policyholder to the insurer. Mark S. Parris & Rodney B. Younker, *The "As Damages" Clause Under Washington Law: Holding Insurers to Their Bargain*, 28 Gonz. L. Rev. 609, 621-22 (1992-93). Congress, by enacting CERCLA, decided to retroactively impose costly liability on groups of persons who did not anticipate this type of liability. The only question is which group of unsuspecting potential payees of these cost (insureds or their insurers) must ultimately pay for this liability? The answer to this inquiry is strictly one of contractual construction.

generally disinclined to reverse prior interpretations of these terms.

¶117 However, the CGL's treatment of CERCLA claims presents unusual, if not unique, policy construction problems, which justify this court's deviation from general principle. Most, if not all, CGL policies executed today will not be governed by either this decision *or* by *Edgerton*. The CGL policy language at issue in this case was drafted long ago and has since been rendered largely inapplicable in the context of CERCLA actions. Beginning in 1985, insurance companies revised their standardized CGL policies to include absolute pollution exclusions from coverage.[48] This revision followed on the heels of over a decade of coverage periods in which CGL policies had included limited pollution exclusion clauses. *See Peace* v. *Northwestern Nat. Ins. Co.*, 228 Wis. 2d 106, 141, 596 N.W.2d 429 (1999) (explaining this evolution in CGL policy language related to pollution exclusions); *see also* Jim L. Julian & Charles L. Schlumberger, *Insurance Coverage for Environmental Clean-up Costs Under Comprehensive General Liability Policies*, 19 U. Ark. [72] Little Rock L. Rev. 57, 58-59 (1996). The CGL policies given effect in this case are no longer being marketed, *nor were they at any time after Edgerton.* Therefore, the insurers cannot credibly argue that *Edgerton* established significant reliance interests, in terms of how insurance contracts have been drafted and bargained for, that will be harmed by its reversal.[49]

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[48] *See* Rachel A. Schneider, *City of Edgerton* v. *General Casualty: What's a Poor Insured to Do?* 2 Wis. Envtl. L.J. 275, 284 (1995). These provisions have almost universally been held to be clear and enforceable. *See* 1 Tod I. Zuckerman & Mark C. Raskoff, *Environmental Insurance Litigation: Law and Practice*, § 3:1 n.l, at 3-2 (1996 & Supp. 2002).

[49] To be sure, insurers and insureds may have assessed their respective expected costs and obligations in situations governed by *Edgerton* and have accounted accordingly. However, this ancillary reliance is not the type of conduct modification upon which the merit of stare decisis is predicated.

¶118 Finally, we do not share the insurers' dire prediction that overruling *Edgerton* will result in a dramatic increase in insurance coverage litigation and the unnecessary expenditure of litigation and judicial resources to address coverage issues that, the insurers allege, are now avoided. As discussed above, *Edgerton* itself has done everything *but* forestall litigation in this specific area of the law. In addition to the *Hills* case, numerous appellate decisions, both published and unpublished, **[73]** and many circuit court actions have transpired since *Edgerton*, each attempting to resolve numerous coverage issues left unsettled by *Edgerton*. Moreover, other issues concerning coverage, even under the *Edgerton/Hills* scheme articulated by the court of appeals in *Johnson Controls I*, appear destined to arise if this court were to continue its strained attempt to reconcile *Edgerton* with *Hills*.

¶119 In sum, there are ample compelling reasons to overrule *Edgerton*. The applicable rules of law established by *Edgerton* are not settled, much less settled correctly. Therefore, the errors of *Edgerton*, catalogued earlier in this opinion and amplified by the preceding discussion, must be corrected by this court.

V

¶120 A government-issued notice alleging an insured's liability for environmental response costs under CERCLA

In addition, the fact that companies, including Johnson Controls, have purchased Environmental Impairment Liability (EIL) insurance polices to supplement their general liability policies is not an indication of reliance on the holdings of *Edgerton*. Rather, it shows that *insurers* have, since the issuance of the CGL policies at issue in this case, realized that the scope of former CGL policies included these response costs, that the insurers did not want to cover such costly property damages, and that they revised the CGL policies to expressly eliminate such coverage. Insureds simply and rationally responded to the resultant void in their coverage and purchased newly offered EIL policies to fill the gap created by the insurance companies' own attempts to preclude coverage of these liabilities. *See Olin Corp.* v. *Ins. Co. of N. Am.*, 221 F.3d 307, 325 (2d Cir. 2000).

constitutes the commencement of a legal proceeding that, in the CERCLA context, is the functional equivalent of a suit. These administrative proceedings are adversarial in nature and substantially affect the interests of the insured with respect to its liability and obligations under CERCLA. We hold that Johnson Controls reasonably expected that its CGL insurers' duty to defend would begin after it received potentially responsible party letters and conveyed them to the insurers. We also conclude that costs incurred to clean up damaged property as a result of an insured's liability under CERCLA are sums that an insured is legally obligated to pay as damages and must be **[74]** indemnified by Johnson Controls' insurers, unless coverage is excluded by other provisions in the policies.

¶121 In reaching these conclusions, we overrule *City of Edgerton* v. *General Casualty Co. of Wisconsin*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994), and reject the too narrowly stated definition of damages in *Shorewood*.

¶122 Because we reach these conclusions, there is no need to wrestle with the competing policy arguments relating to categories three and four, as defined by the court of appeals. Without *Edgerton*, there is no category one situation; without a category one, there can be no categories three and four. In fact, the entire need for the four-category taxonomy developed by the court of appeals disappears and the consequential damage principles of *Hills* universally apply, irrespective of whether the insured commences remediation under its legal obligations prescribed under CERCLA or Wis. Stat. ch. 292, or whether a cost recovery action is brought by the DNR, the EPA, or any another party.

¶123 Although this court would like to end this action after more than 13 years of litigation, we must remand the cause for further proceedings consistent with this opinion. The insurers have retained defenses to coverage related to other exclusions in the policies and/or other disputed issues of fact. Under the present posture of this action, these

issues are outside the scope of our present review and remain to be judicially determined.

[75] *By the Court.*–The decision of the court of appeals is reversed, and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

[1] ¶124 N. PATRICK CROOKS, J. (*concurring*). While I agree with the majority opinion, I write separately to express my regret over the length of time it took for the difficulties presented by the *Edgerton* decision to be resolved.

¶125 Six years ago this court's decisions in *General Cas. Co. of Wisconsin* v. *Hills*, 209 Wis. 2d 167, 561 N.W.2d 718 (1997), and *Wisconsin PSC* v. *Heritage Mut. Ins. Co.*, 209 Wis. 2d 160, 561 N.W.2d 726 (1997), sought to limit the damage caused by the *Edgerton* decision, without explicitly overruling that case. *See* majority op., ¶17.

¶126 Our decisions in *Hills* and *Heritage* highlighted the proper focus courts should employ when determining cases like *Johnson Controls*. As correctly noted by the majority, the analysis should be on the interpretation of the insurance policy, and not on environmental law. *See* majority op., ¶31 n.16. The *Hills* opinion stated:

> In general, the interpretation of an insurance contract is controlled by principles of contract construction. *See, e.g., Kuhn* v. *Allstate Ins. Co.*, 193 Wis. 2d 50, 60, 532 N.W.2d 124 (1995); *Maas [v. Ziegler]*, 172 Wis. 2d 70, 79, [492 N.W.2d 621 (1992)]. The primary objective in interpreting a contract is to ascertain and carry out the intentions of the parties. *See, e.g., Maas*, 172 Wis. 2d at 79; *Kremers-Urban Co.* v. *American Employers Ins. Co.*, 119 Wis. 2d 722, 735, 351 N.W.2d 156 (1984). "Of primary importance is that the language of an insurance policy should be interpreted to mean what a reasonable person in the position of the insured would have understood the words to mean." *Sprangers [v. Greatway Ins. Co.]*, 182 Wis. 2d 521, 536, [514 N.W.2d 1 (1994)]; *accord, e.g., Kuhn*, 193

> Wis. 2d at 60; *Kremers-Urban. Co.*, 119 Wis. 2d at 735.

Hills, 209 Wis. 2d at 175.

[2] ¶127 It was also emphasized in *Hills* that: "It has long been the law of this state that the cost of repairing and restoring damaged property and water to its original condition is a proper measure of *compensatory* damages." *Id.* at 181. As noted by the majority at ¶157, several cases and authorities were cited in support of this statement. The *Edgerton* decision did not address these cases and authorities at all.

¶128 Although the lower courts made a valiant effort to apply our decisions in *Hills* and *Heritage*, two new categories were developed in order to determine whether various situations would or would not be covered by language in comprehensive general liability insurance policies. *See* majority op., ¶21.

¶129 Instead of limiting *Edgerton*, as we hoped would occur after *Hills* and *Heritage*, the court of appeals concluded that the two new categories were controlled by the rationale of *Edgerton*. *See* majority op., ¶24. According to the court of appeals:

> The third category presents a situation where the insured is responsible for at least part of the contamination of a site that it does not own, and *has* been directed by a government to remediate the site, but has not done so. The insured is sued by the government to recover money it spent to clean up the site.

Johnson Controls v. *Employers Ins. of Wausau*, 2002 WI App 30, 57, 250 Wis. 2d 319, 640 N.W.2d 205 (*Johnson Controls II*). The court of appeals also stated:

> The fourth category encompasses situations where the insured is responsible for at least part of the contamination of a site that it does not own, and has been directed by a government entity to remediate the site, but has not done so. The

> insured is sued by the [3] site's owner or others also responsible for the contamination who cleaned up the site at the government's direction.

Id., ¶8. The court of appeals, in finding no insurance coverage for scenarios covered by categories three and four, further stated:

> In categories three and four, unlike in two, a property owner is not seeking "legal damages" for injury to its property by one who has either caused or contributed to the pollution. Rather, the government and property owners forced by the government to clean up contamination allegedly caused by Johnson Controls are seeking what *Edgerton* noted was "equitable monetary relief," that is, recompense for monies spent in complying with the nation's environmental-protection laws—*money that would have been spent by Johnson Controls if it had complied with the government's cleanup directives.*

Id., ¶19 (citing *Edgerton*, 184 Wis. 2d at 784).

¶130 This approach did not result in the limiting function that it was hoped would occur from application of *Hills* and [4] *Heritage*. In retrospect, it seems quite clear that we should have overruled, not distinguished, *Edgerton* six years ago.[1]

¶131 As a result of this, the problems created by *Edgerton* were unfortunately allowed to continue

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[1] In her concurring opinion in *Hills* Chief Justice Abrahamson noted her belief that "the majority opinion marks a significant step towards overruling *Shorewood*, upon which *Edgerton* relied . . . ." She further stated her desire to "embrace the inevitable now by expressly overruling *Shorewood* and thereby recognizing the limited application of the *Edgerton* decision on damages." She did not wish to see *Shorewood* and *Edgerton* "overturned in small measures by debatable judicial distinctions." *General Cas. Co. of Wisconsin* v. *Hills*, 209 Wis. 2d 167, 185-86, 561 N.W.2d 718 (1997) (Abrahamson, C.J., concurring).

unnecessarily for six more years after our decisions in *Hills* and *Heritage*.

¶132 For the reasons discussed, I respectfully concur.

[1] ¶133 JON P. WILCOX, J. (*dissenting*). I disagree with the majority opinion, which regretfully overturns this court's decision in *City of Edgerton* v. *General Casualty Company of Wisconsin*, 184 Wis. 2d 750, 617 N.W.2d 463 (1994), rendered nearly a decade ago, and relied upon both by courts and numerous private parties. Because the majority fails to seriously consider several factors that support adherence to the doctrine of stare decisis in this case, I respectfully dissent from the majority opinion.

¶134 This case originated in 1989. After the circuit court in the original action dismissed Johnson Controls' claims regarding insurance coverage in 1995, this case came before us on a bypass petition. After holding the petition in abeyance until our decision in *General Casualty Company of Wisconsin* v. *Hills*, 209 Wis. 2d 167, 561 N.W.2d 718 (1997), was rendered, this court, on June 10, 1997, unanimously denied Johnson Control's petition, which made many of the same arguments presented now. Since the time *Edgerton* was decided, this court has been presented with numerous opportunities and requests to overturn the decision. Until today, this court has consistently refused to do so.

¶135 More importantly, nothing of legal consequence has changed since *Edgerton*. The insurance policy language before us has not changed. The applicable federal law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), has not changed. This case does not present us with a wholly new set of facts. The only thing that has changed is the [2] personnel of this court and this court's view as to the proper definitions of "damages" and "suit." Overruling an established body of cases in this context raises serious questions about whether the court is "implementing 'principles . . . founded in the law rather than in the proclivities of individuals.'" *Payne v. Tennessee*, 501 U.S. 808, 853 (1991) (Marshall, J., dissenting) (citation omitted). "*[S]tare decisis* is important not merely because

individuals rely on precedent to structure their commercial activity but because fidelity to precedent is part and parcel of a conception of the 'judiciary as a source of impersonal and reasoned judgments.'" *Id.* at 852 (Marshall, J., dissenting) (citation omitted).[1]

¶136 Although the majority opinion offers a lengthy presentation of the doctrine of stare decisis, by overruling an established body of Wisconsin law simply because it feels *Edgerton* was wrongly decided, the majority, in effect, fails to do justice to a doctrine that forms one of the foundational pillars of our judicial system.

¶137 Because *Edgerton* is well-established precedent in Wisconsin, the question is not who has the better argument regarding the applicable policy language, but "whether today's [3] majority has come forward with the type of extraordinary showing that this [c]ourt has historically demanded before overruling one of its precedents." *Payne*, 501 U.S. at 848 (Marshall, J., dissenting).[2] Thus, rather than offering a fervent repudiation of the majority's rationale and rehashing an argument previously settled, I merely explain why the court should adhere to the doctrine of stare decisis in the matter before us.

¶138 "Stare decisis is the motto of courts of justice." *Ableman* v. *Booth*, 11 Wis. 498 (1859). Adherence to stare decisis is crucial because "[r]espect for precedent 'promotes the evenhanded, predictable, and consistent development of

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[1] Wisconsin's stare decisis jurisprudence is akin to that of the federal courts. *See, e.g., Linville* v. *City of Janesville*, 174 Wis. 2d 571, 591-92, 497 N.W.2d 465 (Ct. App. 1993) ("[T]he principle that stare decisis is a substantial disincentive to change is applicable to any court.") (citing *Planned Parenthood of Southern Pa.* v. *Casey*, 505 U.S. 833 (1992); *State* v. *Stevens*, 181 Wis. 2d 410, 441-42, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring) (quoting *Akron* v. *Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 (1983)).

[2] "Adhering to precedent 'is usually the wise policy, because in most matters, it is more important that the applicable rule of law be settled than it might be settled right.'" *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991).

legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *State* v. *Outagamie County Bd. of Adjustment*, 244 Wis. 2d 613, 628 N.W.2d 376 (2001).

> Fidelity to precedent, the doctrine of *stare decisis* "stand by things decided", is fundamental to "a society governed by the rule of law." When legal standards "are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results."
>
> . . . .
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> No change in the law is justified by "a change in the membership of the court or a case with more egregious facts."

State v. *Stevens*, 181 Wis. 2d 410, 441-42, 511 N.W.2d 591 (1994) (Abrahamson, J., concurring).

[4] ¶139 In addition to the plain dictates of the doctrine, there are several overriding reliance factors present in this context that the majority opinion fails to address, which demand an adherence to stare decisis. Thus:

> We should accord weight to this continued acceptance of our earlier holding. *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.

Hilton v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

¶140 Most, if not all, of these reliance factors are present in this case. First, the insurance industry is one of the most heavily regulated business sectors in the state. The legislature has, in the past, enacted specific legislation

in response to our construction of policy language.[3] Considerations of stare decisis are stronger where the legislative prerogative to overturn our decisions is involved. *See Hilton*, 502 U.S. at 202 (Scalia, J., concurring) ("'Considerations of *stare decisis* have special force [where] the legislative power is implicated, and Congress remains free **[5]** to alter what we have done.'") (internal citation omitted). Thus, adherence to stare decisis is especially appropriate because in Wisconsin, the legislature has the final say over regulation of the insurance industry and it could possibly act to change the rule of *Edgerton*.[4]

¶141 Moreover, "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828.[5]

> [W]e have made it clear that this court, in general, would depart from *stare decisis* only where unintentional conduct was involved and then *only when there were compelling reasons for altering a court-made rule.* [We also recently] pointed out our

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[3] *See, e.g.*, Wis. Stat. § 632.32(5) (f) (1995-96), permitting an insurer to add a clause to an automobile policy that prohibits "stacking" of policy benefits; *Blazekovic* v. *City of Milwaukee*, 2000 WI 41, ¶20, 234 Wis.2d 587, 610 N.W.2d 467 (noting Wis. Stat. § 632.32(5) (f) "validat[es] such clauses to avoid the duplication of benefits permitted under prior case law"). *Cf.* Wis. Stat § 103.465 (1995-96), abrogating the judicial blue-pencil announced in *Fullerton Lumber Co.* v. *Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955).

[4] As the Supreme Court has said in a slightly different context: "Congress has the final say over regulation of interstate commerce and it can change the rule of *Bellas Hess* by simply saying so. We have long recognized that the doctrine of stare decisis has 'special force' where 'Congress remains free to alter what we have done.'" *Quill Corp.* v. *North Dakota*, 504 U.S 298, 320 (1992) (Scalia, J., concurring) (citation omitted).

[5] *See also Quill Corp.*, 504 U.S. at 320 ("Moreover, the demands of the doctrine are 'at their acme . . . where reliance interests are involved.'") (citations omitted).

> reluctance to deviate from precedent where rules of contract or property were involved.

Antoniewicz v. *Reszcynski*, 70 Wis. 2d 836, 869, 236 N.W.2d 1 (1975) (emphasis in original) (internal citations and quotations omitted); *see also Gottlieb* v. *City of Milwaukee*, 33 Wis. 2d 408, 431, 147 N.W.2d 633 (1967) (accord).

¶142 The majority opinion attempts to avoid this consideration by characterizing the decision as one involving unintentional tort-like conduct. *See* majority op., ¶¶113-15. [6] While this *may* be true insofar as the underlying conduct giving rise to the policy dispute is concerned, the majority decision today abrogates a rule regarding *contract interpretation*. The court alters the rights and expectations of parties to a contract; it does not merely create a new rule governing standards of behavior. The determination of whether to purchase certain types of insurance coverage and the drafting of language within insurance policies certainly constitutes intentional conduct.

¶143 Further, stare decisis concerns are particularly strong where substantial reliance in the affected business community occurs. Thus, where a "rule . . . has become part of the basic framework of a sizeable industry[,] [t]he 'interest in stability and orderly development of the law' that undergirds the doctrine of *stare decisis* . . . counsels adherence to settled precedent." *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 317 (1992) (internal citations omitted). There is no doubt that the insurance industry constitutes a "sizeable industry." Furthermore, the number of litigants who have been subjected to the *Edgerton* and *Hills* definition of "damages" and "suit" demonstrate that the *Edgerton* and *Hills* decisions have become [7] part of the basic framework of the insurance industry.[6] *Edgerton* itself

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[6] *See, e.g., State* v. *Hydrite Chem. Co.*, 2002 WI App 222, 257 Wis. 2d 554, 652 N.W.2d 828; *Nor-Lake, Inc.* v. *Aetna Cas. & Sur. Co.*, 2000 WI App. 94, 234 Wis. 2d 526, 611 N.W.2d 471, *rev. denied*, 2000 WI 88, 237 Wis. 2d 253, 616 N.W.2d 115; *Amcast Indus. Corp.* v. *Affiliated FM Ins. Co.*, 221 Wis. 2d 145, 584 N.W.2d 218 (Ct. App. 1998), *rev. denied*, 221 Wis.

has been cited 242 times since it was decided.[7] While obviously not all of these authorities agree with the *Edgerton* holding, the number of citations itself demonstrates how entrenched *Edgerton* has become in this area of the law. In addition to the large number of litigants subjected to the *Edgerton* and *Hills* rule of law, it is very probable that a substantial number of businesses, relying on *Edgerton*, refrained from litigating CERCLA related disputes with their insurers.

¶144 The majority asserts that "[m]ost, if not all, CGL policies executed today will not be governed by either this decision *or* by *Edgerton*." Majority op., ¶117 (emphasis in majority). The majority then proceeds to argue that this fact [8] supports their refusal to adhere to stare decisis. Regardless of the applicability of today's decision to current insurance policies, the fact remains that a substantial group of similarly situated insureds, with policy language identical to Johnson Controls' insurance policy, have been subjected to the *Edgerton* and *Hills* rule of law. Having determined in *Hills* that the principles of *Edgerton* were still controlling in the CERCLA context, and through our subsequent assurances of the validity of *Edgerton* by rejecting multiple requests to overturn *Edgerton* in the past, "we ought not visit economic hardship upon those who took us at our

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2d 654, 588 N.W.2d 631 (1998); *Hydrite Chem. Co.* v. *Aetna Cas. & Sur. Co.*, 220 Wis. 2d 26, 582 N.W.2d 423 (Ct. App. 1998), *rev. denied*, 220 Wis. 2d 363, 585 N.W.2d 156 (1998); *Robert E. Lee & Assoc., Inc.* v. *Peters*, 206 Wis. 2d 509, 557 N.W.2d 457 (Ct. App. 1996), *rev. denied*, 211 Wis. 2d 531, 568 N.W.2d 298 (1997); *Spic and Span, Inc.*, v. *Cont'l Cas. Co.*, 203 Wis. 2d 118, 552, N.W.2d 435 (Ct. App. 1996), *rev. denied*, 211 Wis. 2d 530, 568 N.W.2d 297 (1997); *Sauk County* v. *Employers Ins. of Wausau*, 202 Wis. 2d 433, 550 N.W.2d 439 (Ct. App. 1996), *rev. denied*, 211 Wis. 2d 530, 568 N.W.2d 297 (1997); *Regent Ins. Co.* v. *City of Manitowoc*, 205 Wis. 2d 450, 556 N.W.2d 405 (Ct. App. 1996), *rev. denied*, 211 Wis. 2d 530, 568 N.W.2d 297 (1997). The majority concedes this point. *See* majority op., ¶118.

[7] This list includes 86 cases, one administrative decision, and numerous secondary sources, including several practice guides, specialty reporters, and insurance treatises.

word." *Quill Corp.*, 504 U.S at 321 (Scalia, J., concurring) (citation omitted).

¶145 The practical effect of overruling *Edgerton* now, after nearly a decade of vitality, is to subject a group of similarly situated litigants to two different rules of law based merely upon the time they litigated their dispute. This result runs contrary to the basic principles of justice in a free society.[8]

¶146 Moreover, the fact that since *Edgerton*, insureds have purchased additional forms of insurance to cover pollution cleanup expenses demonstrates that there has been substantial reliance on *Edgerton* in the insurance community. The majority asserts that the change in policy language and development of new forms of coverage does not evidence reliance on *Edgerton*, but rather:

> **[9]** shows that *insurers* have, since the issuance of the CGL policies at issue in this case, realized that the scope of former CGL polices included these response costs, that the insurers did not want to cover such costly property damages, and that they revised the CGL policies to expressly eliminate such coverage.

Majority op., ¶117 n.49.

¶147 However, after *Edgerton*, Wisconsin was among a distinct minority of jurisdictions that held that "damages" in CGL policies did not include CERCLA response costs. Thus, while the majority's rationale may hold true regarding the mass of jurisdictions adopting the contrary rule, it is more probable that in Wisconsin, other forms of pollution insurance were purchased specifically because this court found that a standard CGL policy did not cover these expenses.

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[8] *See People* v. *Jones*, 350 N.E.2d 913, 915 (N.Y. 1976) (Breitel, C.J., dissenting) (citing Aristotle, *Ethica Nicomachea*, book V, ¶¶1129a, 1131a (Ross ed.)).

¶148 Although the majority purports to be "mindful of the reliance interests of businesses . . . that have arisen due to this court's holding in *Edgerton*[,]" majority op., ¶116, it then proceeds to assert: "To be sure, insurers and insureds may have assessed their respective expected costs and obligations in situations governed by *Edgerton* and have accounted accordingly. However, this ancillary reliance is not the type of conduct modification upon which the merit of stare decisis is predicated." Majority op., ¶117 n.49.

¶149 Quite the contrary, one of the fundamental justifications for the rule of stare decisis is to provide a consistent predictable rule of law upon which society, particularly businesses, may properly order their affairs, i.e., engage in rational business decision-making, without the continuous ominous threat of the legal bases for those decisions **[10]** being changed. *See, e.g., James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 551-52 (1991) (O'Connor, J., dissenting) ("At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them."); *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1367 (7th Cir. 1996) (Ripple, J., concurring) ("[W]e ought to ensure, through strict application of the doctrine of stare decisis and precedent, that the law is sufficiently predictable and certain to permit businesses to order their affairs with a clear understanding of what the law requires."); *Smith* v. *Brennan*, 157 A.2d 497, 501 (N.J. 1960) ("Stare decisis . . . applies primarily to decisions . . . , which invite reliance and on the basis of which men order their affairs, e.g., in the field of contract or property rights.").

¶150 While the majority is correct when it notes that a standard CGL policy covers all known and unknown losses, majority op., ¶115, since *Edgerton* and *Hills*, insurers have rationally concluded that they have no liability for environmental response costs when the costs are incurred as a result of administrative proceedings, as opposed to certain third party lawsuits. Thus, while their policies, in general, covered all known and unknown losses, after *Edgerton*, this

court made known to insurers that certain categories of losses would not be covered. Regardless of whether insurers originally expected their CGL policies to cover CERCLA-like costs, what is important is that this court specifically told them in *Edgerton* [11] that their policies did not cover these costs. The majority, by overturning *Edgerton* today, defeats those expectations, and frustrates the business decisions and predictions made in reliance on *Edgerton* and *Hills*. "The original risk assessment [made after *Edgerton*] becomes a nullity if the language of the policy is redefined in order to expand coverage beyond what was planned for by the insurer in the contract of insurance." *Edgerton*, 184 Wis. 2d at 779 n.26. As a result of today's decision, insurers are now at risk for liabilities they did not anticipate, and consequently, for which they did not collect premiums.

¶151 Finally, refusing to adhere to stare decisis in this case sends a precarious message to litigants suffering adversely from our decisions. The solidity of the judiciary depends upon non-prevailing litigants accepting our decisions and adjusting their behavior accordingly. By overturning established precedent today, after repeatedly refusing to do so in the past, the court tells litigants with the means to do so that they are better served through constant expostulations and challenges to adverse decisions than by acknowledging the validity of the state's law, even if reluctantly, and abiding by it. Now, due to its persistence and this court's newfound change of heart as to the validity of *Edgerton*, Johnson Controls has finally gotten its way.

¶152 Without adherence to stare decisis, "courts would not be making any 'law'; they would just be resolving the particular dispute before them." Antonin Scalia, "Common-Law Courts in a [12] Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws", *in A Matter of Interpretation, Federal Courts and the Law* 3, 7 (1997). If the resolution of each dispute before this court is open to reassessment based merely on the perseverance of the litigants and the grace of the court, the

foundation of an impartial judiciary crumbles, and our beacon of judicial light becomes an erratic reflection, with no discernible course.

¶153 The majority does offer some justifications for disregarding stare decisis. The majority first concludes that our decision in *Hills* undercuts and destroys the rationale of *Edgerton*, such that the two cannot be reconciled. Majority op., ¶¶102-05.[9] Interestingly, the *Hills* decision itself recognizes that the two decisions can co-exist on the same intellectual plane:

> [T]he nature of the relief being sought by Arrowhead is different than that sought by the DNR in *Edgerton*. *We therefore reject General Casualty's assertion that we must overrule Edgerton in order to hold that the suit in this case seeks "damages."* *Edgerton* continues to stand for the proposition that receipt of a letter from the EPA or DNR requesting a party to propose a remediation plan does not constitute a "suit seeking damages."

Hills, 209 Wis. 2d at 182 (emphasis added). Yet, despite this rationale, the majority asserts: "*Hills* did not conclude that the nature of the relief sought changes based on the identity of the party bringing the action. The opinion merely concluded that the DNR and EPA, when parties in a CERCLA cost recovery **[13]** action, are somehow different from other parties." Majority op., ¶107. The dispositive factor in *Hills* was not, as the majority suggests, the identity of the parties; rather, it was "*the type of relief sought and the posture of the party seeking relief.*" *Amcast Indus. Corp.* v. *Affiliated FM Ins. Co.*, 221 Wis.2d 145, 225, 584 N.W.2d 218 (Ct. App. 1998) (emphasis in original).

¶154 In fact, *Hills* relied on the definition of "damages" adopted by *Shorewood* and *Edgerton*: "Thus, under the

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[9] "[I]f we do not remove or limit the force of *Edgerton*, we must remove or limit the force of *Hills*." Majority op., ¶105.

definition set forth and applied in *Shorewood* and *Edgerton*, Arrowhead is seeking 'damages' from Hills as that word is used in the insurance policies at issue." *Hills*, 209 Wis. 2d at 181. Then applying this same definition, *Hills* concluded that while the governmental action in *Edgerton* did not fall within this definition of damages, the action before it did. *Id.* at 180-81. Therefore, the difference in result between *Edgerton* and *Hills* is not one based on logically inconsistent rationales, but rather a factual distinction based upon the same underlying reasoning. *Id.*

¶155 The majority identifies its own inconsistency because it focuses on the nature of the derivative conduct giving rise to CERCLA liability and the results in each case, rather than on the nature of the action for which the insured seeks policy coverage. The distinction between *Edgerton* and *Hills* is not, as the majority asserts, based on "the fortuity of whether the insured had ever been contacted in some manner by the government." Majority op., ¶62. Rather, this distinction **[14]** centers on *Hills'* conclusion that the type of relief sought by a third party is different than the type of relief sought by the government in CERCLA proceedings. *Hills*, 209 Wis. 2d at 182.

¶156 There is only conflict between *Edgerton* and *Hills* because the majority has eviscerated the underlying rationale of *Edgerton* and then focused on the result reached in both cases. Although *Edgerton* appears inconsistent with *Hills* if one adopts the majority's view of "damages" in the CERCLA context, that is not the point. The point is that *Edgerton* and *Hills* were consistent under the rationale employed by the court when those decisions were rendered. In essence, the majority disagrees with *Edgerton's* logic, concludes it has the better argument, and then judges the continued co-existence of the two cases by retrospectively applying its new paradigm to them. This is not a justifiable basis for refusing to adhere to precedent.

¶157 To further widen the artificial intellectual chasm between *Edgerton* and *Hills*, the majority points to the fact that the *Edgerton* court did not take into account

expectations of the insured, while the *Hills* court did. Majority op., ¶104. However, taking into account the reasonable expectations of the insured when construing the language of an insurance policy does not ipso facto mean construing the policy to bear a pro-insured result.

> In the case of an insurance contract, the words are to be construed in accordance with the principle that the test is . . . what a reasonable person in the position of the insured would have understood the words to mean. Whatever ambiguity exists in a contract of insurance is resolved in favor of the insured. . . .
>
> **[15]** . . . However, when the terms of the policy are unambiguous and plain on their face, the policy should not be rewritten to include insurance coverage not agreed to by the parties and for which it was not paid.

Sch. Dist. of Shorewood v. *Wausau Ins. Cos.*, 170 Wis. 2d 347, 367, 488 N.W.2d 82 (1992) (internal citations omitted).

¶158 The court in *Shorewood*, having determined that "'[d]amages' as used in these insurance policies unambiguously means legal damages[,]" *id.* at 368, the *Edgerton* court in construing the same phrase was not required to discern the reasonable expectation of the insured, as the precise language they were interpreting had already been determined to be unambiguous. *Edgerton* itself recognized this: "[A]n insured's expectations may not be satisfied in contradiction to policy language which clearly identifies the scope of the insured's coverage." *Edgerton*, 184 Wis. 2d at 780. The mere fact that the context of *Edgerton* was different than the factual context of *Shorewood* does not justify a reinterpretation of that phrase:

> [A]ppellate courts are not bound to reexamine a determination of a phrase in an insurance policy with each differing fact situation. . . . When difficulty comes in applying the plain meaning of the phrase to a particular fact situation, an otherwise unambiguous provision is not made

> ambiguous simply because it is difficult to apply to the facts of a particular case.

Quinlan v. *Coombs*, 105 Wis. 2d 330, 334-35, 314 N.W.2d 125 (Ct. App. 1981). Thus, the fact that a rule or interpretation may generate hard questions in the future, *see* majority op., ¶109, **[16]** is not a reason to abandon that rule once it has been firmly rooted in this state's jurisprudence.[10]

¶159 The majority next suggests that stare decisis need not be followed in this case because *Edgerton* has failed to provide "suitable direction and consistency to this area of the law." Majority op., ¶106. However, the majority's determination that a PRP letter is a "functional equivalent" of a "suit" such that "insurers have a duty to defend an insured who receives a PRP letter from the EPA or an equivalent state agency seeking remediation or remediation costs . . . [,]" majority op., ¶92, while purporting to establish a bright line rule, fails to adequately rationalize under what circumstances a PRP letter will trigger a duty to defend.

¶160 Not all PRP letters contain a demand for pecuniary remuneration. *Edgerton*, 184 Wis. 2d at 775 (noting that the letters from the EPA and DNR in that case merely sought information and asked for voluntary compliance). Are *all* PRP letters to be considered a "suit"? If a recipient of a PRP letter merely provides information, or does act voluntarily, what is there to defend against? What precise language in a PRP letter is necessary to assume a sufficient adversarial posture? Must an insurer provide a "defense" simply because a PRP letter has been received by an insured, without any regard to the **[17]** contents, tenor, or requests contained therein? What, if any, circumstances would permit an insurer to refuse to defend, once a PRP letter has been received by an insured, without

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[10] "[It is important] that we retain our ability—[and] . . . public confidence in our ability—sometimes to adopt new principles for the resolution of new issues without abandoning clear holdings of the past that those principles contradict." *Quill Corp.*, 504 U.S at 320-21 (citation omitted).

being liable for bad faith breach of contract?[11] A rule that leaves unanswered so many significant questions can hardly be characterized as promoting consistent and logical results.

¶161 Conversely, *Edgerton did* provide suitable direction and consistency in this regard: "'Suit' denotes court proceedings, not a 'functional equivalent.' . . . Either there is a suit or there is not. When there is no suit, there is no duty to defend." *Edgerton*, 184 Wis. 2d at 781. This was a clear, workable rule, based upon an unambiguous legal [18] definition, which has produced consistent results. Furthermore, this previous construction of "suit" was based on a commonsense, everyday understanding of the term. Johnson Controls did not contract to be defended when it faced the "functional equivalent of a suit"; it contracted to be defended from "suits."

¶162 In sum, I dissent because the majority failed to consider several important reliance interests that further buttress adherence to stare decisis in this context. Further, I do not find any of the majority's reasons for departing from stare decisis in this case to be persuasive. Finally,

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[11] The willingness of many courts to give an expansive interpretation to "suit" has presented practical difficulties in applying traditional rules that have governed the duty to defend in such states.

> The mere fact that a PRP letter may be deemed to be a "suit" does not automatically require an insurer to defend. As with actual lawsuits, the allegations set forth in these claims must be compared against the insurer's policy to determine whether there is any potential for coverage.
>
> Unfortunately, the determination of whether a PRP letter triggers a duty to defend is made more difficult by the fact that such notices rarely contain substantive factual allegations and are typically silent as to when or how pollution occurred. Although a growing number of states permit the consideration of extrinsic facts, both to create and to refute a duty to defend, many states continue to adhere to the traditional view that an insurer may not look beyond the "four corners" of the underlying complaint in considering whether it has a duty to defend.

David L. Leitner et al., Law and Practice of Insurance Coverage Litigation § 44.3, *The Duty to Defend Pollution Claims* (2001).

regardless of who has the better argument as to the meaning of "damages" in a CGL policy in the context of CERCLA, I do not believe that *Edgerton* and *Hills* were based upon fundamentally different rationales, such that their continued co-existence is impossible to reconcile.

¶163 For these reasons, I am of the opinion that there is no need or justification to overrule *Edgerton* today; therefore, I am compelled to dissent.

¶164 I am authorized to state that Justice ANN WALSH BRADLEY joins this dissent.

APPENDIX B

COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Cir. Ct. No. 89CV016174

Appeal No. 01-1193
STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

JOHNSON CONTROLS, INC.

PLAINTIFF-APPLLANT,

v.

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY (F/N/A EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN), AFFILIATED FM INSURANCE COMPANY, AIU INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY (AS SUCCESSOR TO NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, AMERICAN EMPLOYERS INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA, EMPLOYERS MUTUAL CASUALTY COMPANY,

EMPLOYERS REINSURANCE CORPORATION, FEDERAL INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, LANDMARK INSURANCE COMPANY, LONDON MARKET (CERTAIN UNDERWRITERS AT LLOYD'S LONDON AND LONDON MARKET INSURANCE COMPANIES), NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY (AS PREDECESSOR TO ALLSTATE INSURANCE [2] COMPANY), PURITAN INSURANCE COMPANY (F/N/A MANHATTAN FIRE AND MARINE INSURANCE COMPANY), STONEWALL INSURANCE COMPANY, TRANSAMERICA PREMIER INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, UNITED NATIONAL INSURANCE COMPANY, ZURICH INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, AND WESTCHESTER FIRE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

ALLIANZ UNDERWRITERS INSURANCE COMPANY, AMERICAN CENTENNIAL INSURANCE COMPANY, AMERICAN INSURANCE COMPANY, ASSOCIATED INTERNATIONAL INSURANCE COMPANY, CALIFORNIA UNION INSURANCE COMPANY, CONTINENTAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, HARBOR INSURANCE COMPANY, NORTH STAR REINSURANCE CORPORATION, AND REPUBLIC INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order and a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 WEDEMEYER, P.J. Johnson Controls, Inc. appeals from an order and a judgment wherein the trial court found that no insurance coverage existed for twenty-one environmentally contaminated landfill sites. Johnson Controls claims the trial court erred when it ruled that all of the sites at issue do not involve "damages." Johnson Controls concedes that ten of the twenty-one sites do not fall into a category which triggers insurance coverage, but argues that the remaining eleven sites should be covered by insurance. Because the trial court's findings of [3] fact (that all twenty-one sites are not covered by the insurance policies) are not clearly erroneous, we affirm.

I. BACKGROUND

¶2 In 1989, Johnson Controls brought suit against Employers Insurance of Wausau and a host of other insurance companies, seeking coverage for costs it incurred relating to the environmental cleanup of twenty-one contaminated landfill sites.[1] Before the suit was resolved, the Wisconsin Supreme Court decided *City of Edgerton* v. *General Casualty Co.*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994). In *Edgerton*, the supreme court concluded that there was no coverage provided for an insured who cleans up an environmentally contaminated site which it either owns or does not own, pursuant to a government directive or request under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601, *et seq.* ("CERCLA"), or its state counterparts. *Edgerton*, 184 Wis. 2d at 782-86.

¶3 As a result, the insurance companies in this case filed motions seeking summary judgment. The trial court granted the motions and dismissed the case as to all sites. Johnson Controls appealed the various judgments and orders.

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[1] The insurance policies involved are either primary or excess comprehensive general liability policies, and promise to defend and indemnify Johnson Controls as a result of its liability for "damages."

¶4 We decided the appeal on October 13, 1998, and remanded the matter "for the entry of a global judgment, broken down into subparts that recite: (1) the property involved; (2) the insurance company or companies and the relevant dates of their policies that relate to that property; and (3) the result [4] required by this opinion." *Johnson Controls, Inc.* v. *Employers Ins. of Wausau*, Nos. 95-1796 & 95-2591, unpublished slip op. at 5 (Wis. Ct. App. Oct. 13, 1998) (*Johnson Controls* I). On remand, the trial court complied with our directive and found that elements were present at each of the twenty-one sites so that each fell into a category where no coverage was provided. Johnson Controls appeals from that order.

II. DISCUSSION

¶5 In the first appeal of this case, we set forth four categories to describe the sites and related situations involved.[2] The first category consists of an insured who is responsible for cleaning up the contamination at a site pursuant to a directive issued by a government under CERCLA or its state counterparts. The costs of this remediation are not "damages." *Edgerton*, 184 Wis. 2d at 782-86. Although Johnson Controls believes that *Edgerton* was decided wrongly, we are obligated to follow its dictates. There is no insurance coverage in connection with remediation of sites that fall under the first category.

¶6 The second category consists of an insured who is responsible for at least part of the contamination of a site that it does not own, but has not been directed by a government to remediate the site. A governmental agency has, however, directed others responsible for the contamination—either the site's owner or those who also polluted the property—to clean it up and they, in turn, sue the insured to recover the cleanup costs attributable to the insured. This situation is governed by *General Casualty Co.* v. *Hills*, 209 Wis. 2d 167, 561 [5] N.W.2d 718 (1997), which held that an

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[2] We borrow liberally from our earlier opinion in this matter.

action by a non-governmental entity seeking those costs is a suit for "damages," for which there is coverage under the comprehensive general liability policies. *Id.* at 180. "[U]nlike *Edgerton*, neither the [Environmental Protection Agency] nor [Wisconsin Department of Natural Resources] have [*sic*] requested or directed [the insured/polluter] to develop a remediation plan or incur remediation and response costs under CERCLA or an equivalent state statute." *Id.* *See also Wisconsin Pub. Serv. Corp.* v. *Heritage Mut. Ins. Co.*, 209 Wis. 2d 160, 561 N.W.2d 726 (1997) (site contaminated by subcontractor's negligence; subcontractor not directed by government to remediate site; direct action against subcontractor's insurance carrier by party remediating the property pursuant to government cleanup directive; held: suit for "damages"); *Spic & Span, Inc.* v. *Continental Cas. Co.*, 203 Wis. 2d 118, 552 N.W.2d 435 (Ct. App. 1996) (site contaminated by insured; insured not directed by government to remediate site; action against insured by those remediating the property pursuant to government cleanup directive; held: suit for "damages"). Under *Hills*, there is insurance coverage in connection with this second category of sites.

¶7 The third category presents a situation where the insured is responsible for at least part of the contamination of a site that it does not own, and has been directed by a government to remediate the site, but has not done so. The insured is sued by the government to recover money it spent to clean up the site. There is no insurance coverage in connection with the scenarios encompassed by category three. *Regent Ins. Co.* v. *City of Manitowoc*, 205 Wis. 2d 450, 463, 556 N.W.2d 405 (Ct. App. 1996) (holding that where the government sues "an insured to recover incurred cleanup costs under § 107(a)(4)(A) of the [CERCLA] . . . or to impose a plan for remediation, that action is not a 'suit for damages' but is, rather, a suit for 'equitable monetary relief.'"). Johnson Controls argues that the supreme **[6]** court's decision in

Hills overruled *Regent*. We rejected this argument when we first considered the appeal, and we reject it again here for the reasons explained in our earlier opinion.[3] As noted, the vitality of *Regent* was reaffirmed post-*Hills* by *Hydrite Chemical Co.* v. *Aetna Casualty & Surety Co.*, 220 Wis. 2d 26, 39 n.5, 582 N.W.2d 423 (Ct. App. 1998).

¶8 The fourth category encompasses situations where the insured is responsible for at least part of the contamination of a site that it does not own, and has been directed by a government entity to remediate the site, but has not done so. The insured is sued by the site's owner or others also responsible for the contamination who cleaned up the site at the government's direction. There is no insurance coverage for sites that are classified as category four.

¶9 In categories three and four, unlike in two, a property owner is not seeking "legal damages" for injury to its property by one who has either caused or contributed to the pollution. Rather, the government and property owners forced by the government to clean up contamination allegedly caused by Johnson Controls, are seeking what *Edgerton* noted was "equitable monetary relief," that is, recompense for monies spent in complying with the nation's environmental-protection laws—*money that would have been spent by Johnson Controls if it had complied with the government's clean-up directives*. *Edgerton*, 184 Wis. 2d at 784 ("Response costs assigned either under CERCLA or secs. 144.442(8) and (9), Stats., are, by definition, considered to be equitable relief and reflect a congressional intent to differentiate between cleanup or response costs under 42 [7] U.S.C. sec. 9607(a)(4)(A) and damages for injury, destruction, or the loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C).").

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[3] We also admonish Johnson Controls for raising many of the same issues which this court already decided in *Johnson Controls* I. Our resolution of those issues was final for purposes of the litigation in this matter as law of the case.

¶10 On remand from this court, the trial court found that all twenty-one sites at issue fall into categories one, three or four. The trial court found that none of the sites fell into category two, and thus, there was no insurance coverage. Our review is limited to whether the trial court's findings of fact are clearly erroneous. WIS. STAT. § 805.17(2).

A. Category One.

¶11 The trial court found that the following sites fell under category one because Johnson Controls received a government directive and then either complied or paid its portion of the cleanup costs: (1) Bergsoe Metal Corporation; (2) NL-Dallas; (3) Tonolli Corporation; (4) NL-Pedricktown; (5) National Steel & Tube Distributors, Compton, CA; (6) Lakeland Disposal Services, Inc.; (7) JCI-Atlanta; (8) Bay Drums; (9) Maxey Flats Nuclear Disposal; (10) JCI-Owosso; (11) NL-Atlanta (National Smelting & Refining); (12) USS Lead Refinery, Inc.; (13) Bennington Landfill; and (14) JCI-Goshen. Johnson Controls argues that the trial court mischaracterized only four sites: Bay Drums, Bennington Landfill, Tonolli Corporation and NL-Pedricktown.

1. Bay Drums.

¶12 Johnson Controls argues that the trial court erred in finding that Bay Drums fell under category one. It contends that the only reason Bay Drums was found to be a category one site was because no lawsuit was filed. According to the trial court's order, it found Bay Drums fell into category one because "[a] notice of potential liability was sent from the EPA to [Johnson Control's [8] subsidiary] dated February 2, 1988. No lawsuit has been filed." Johnson Controls contends that because other parties cleaned up the site in response to the government directives, and then negotiated a settlement with it before suit was filed, it becomes a category two site. We disagree. The trial court's findings here are not clearly erroneous. Johnson Controls received a governmental directive to clean up the site, and eventually shared in its portion of the clean-up costs.

¶13 If we were to categorize this factual scenario as category two, Johnson Controls would be rewarded for standing back and allowing other parties to clean up a site that the government indicated Johnson Controls was, in part, responsible for cleaning. Such a ruling would produce the absurd result of rewarding one who does nothing (with insurance coverage), and punish the vigilant who undertake to comply with the environmental authorities.

2. Bennington Landfill.

¶14 Johnson Controls argues that Bennington Landfill is actually a category two site, and that the reason the trial court found it to be a category one is that no suit was filed. The trial court's order indicated Bennington is a category one site because a "[g]eneral request for information was sent to JCI from the EPA on August 29, 1990. JCI entered into an Administrative Consent Order in 1991. No lawsuit has been filed." The record supports these findings and, therefore, the trial court did not err when it found Bennington most appropriately fell under category one.

3. Tonolli Corporation.

¶15 Johnson Controls makes a similar argument with respect to the Tonolli site; i.e., the trial court mistakenly found it to be category one because no [9] lawsuit was filed. Again, we turn to the trial court's order, wherein it states: "JCI was informed by the EPA in various letters dated April 9, 1987, January 27, 1988 and August 12, 1988, that it had been identified as a potentially responsible party. No lawsuit has been filed against JCI." The record supports these findings.

4. NL-Pedricktown.

¶16 Finally, Johnson Controls argues that the trial court made the same mistake with regard to NL-Pedricktown. Again, the trial court was not mistaken. In its order, the trial court found:

> Globe Union received a letter requesting information on site use from the EPA, dated

> October 6, 1987. Although a lawsuit was filed by NL Industries, Inc., that lawsuit was voluntarily dismissed by NL in the fall of 1991. JCI did not pay NL for any response costs and Wausau provided a defense, under a reservation of rights agreement, to the claim. An Administrative Order was issued by the EPA on April 1, 1992 to various PRPs, including JCI, to implement remediation plans. No lawsuits have been filed after NL's abandonment of its lawsuit.

The trial court's findings are supported by the record.

¶17 In all of these instances, Johnson Controls tries to ignore the contact from the EPA or governmental agency, by trying to argue that the contact was not a "directive," or that § 107 CERCLA cost recovery actions *do* involve covered damages. In support of this argument, Johnson Controls points out that although *City of Manitowoc* held that a § 107 action did not involve a legal "damages" case, the suit in *Hills* was initiated via § 107 and thus, must have overruled *City of Manitowoc*. We do not agree. The distinction in *Hills* was that the gas station owner had not received any directive from a government agency as to his potential liability. The suit against Hills was, among other things, one for contribution from other third parties who had been sued by the government, which sought **[10]** declaratory judgment and response costs. *Hills*, 209 Wis. 2d at 172. The distinguishing factor that our supreme court prescribed in this decision was simple: if the government has contacted you with respect to your potential liability for contamination at a landfill site, whether you clean it up immediately or wait to be sued to do so, you cannot make a claim for "damages." *Id.* at 182. Rather, this claim is for "equitable monetary relief." *Regent*, 205 Wis. 2d at 463. There is no insurance coverage. Although this may seem like somewhat of an arbitrary dis-

tinction to some, this is the law set by our supreme court and we are obligated to apply this law.[4]

B. Category Three.

¶18 The trial court found that the following sites fell into category three because Johnson Controls received a government directive, failed to fully comply, and then was sued by the government: (1) Keefe Environmental Services, Inc.; (2) Auto-Ion; (3) NL-Granite City; (4) Union Scrap Iron & Metal Company, Inc.; and (5) Delaware Sand & Gravel.

1. Keefe Environmental Services, Inc.

¶19 Johnson Controls contends that Keefe is a category two site because a group of private parties who had been sued by the United States for recovery of response costs sued Johnson Controls. Thus, Johnson Controls argues this is akin to *Hills*. The trial court found otherwise:

> **[11]** A letter from the Attorney General of the State of New Hampshire to Globe Union, Inc., dated March 17, 1982 identified JCI as a potentially responsible party at the site which is owned by a third party. A complaint, filed May 5, 1989 . . . seeks enforcement of the PRPs' already existing equitable obligations to participate in remediation efforts.

These facts are supported by the record. Unlike *Hills*, Johnson Controls received a PRP letter from the State of New Hampshire. Thus, the Keefe site is not akin to the *Hills* site.

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[4] It is interesting to note that the difference in outcome between *Edgerton* and *Hills* may have resulted in part because in *Edgerton*, the supreme court failed to consider the expectations of the insured; whereas in *Hills*, such expectation was afforded generous consideration. *Hills*, 209 Wis. 2d 183.

2. Auto-Ion.

¶20 Johnson Controls contends that it never ignored a government directive to clean up this site; thus, it cannot be a category three site. The trial court found:

> A PRP letter was sent from the EPA to Penn Controls, Inc. c/o Johnson Controls, dated November 28, 1984. The government filed a complaint on August 23, 1990 raising a direct claim against JCI for reimbursement of response costs and seeking reimbursement for response costs and seeking enforcement of a remediation plan. The site is owned by a third party.

These facts are supported by the record. These facts make Auto-Ion a category three site.

3. NL-Granite City.

¶21 Johnson Controls argues that NL-Granite City is both a category three site and a category two site. Johnson Controls concedes that it did receive a § 106 UAO in 1990 and failed to comply with it. Subsequently, the EPA filed suit against Johnson Controls and the matter was resolved. Johnson Controls contends that $26,458.07 of the costs was incurred prior to the date of the UAO, and that amount should be covered by insurance. The trial court found otherwise:

> [12] A General Notice of potential liability letter was sent from the EPA to JCI, dated *November 28, 1989*, and a Special Notice letter was sent from the EPA to JCI dated June 25, 1990. A Section 106 order was issued on November 30, 1990 and on July 31, 1991 U.S. filed suit directly against JCI and various other parties . . . for cost recovery and enforcement of the Administrative Order.

(Emphasis added). These findings are supported by the record. Johnson Controls cannot be expected to be rewarded with insurance coverage for costs incurred before the UAO simply because it ignored other letters from the government.

4. Union Scrap Iron & Metal Company, Inc. and Delaware Sand & Gravel.

¶22 The trial court found that both of these sites fell into category three because the United States joined Johnson Controls as a party in an ongoing CERCLA cost recovery action. The record supports these findings.

C. Category Four.

¶23 The trial court found that the following sites were category four sites because Johnson Controls received a government directive, failed to fully comply, and then was sued: (1) Hunt's Disposal Landfill; and (2) NL-Portland (Gould).

¶24 Johnson Controls argues that Hunt's Disposal should be a covered site because the costs it paid constituted legal damages as "substitutionary, monetary relief." The trial court found otherwise:

> A Special Notice Letter dated July 31, 1991 was sent from the EPA to JCI requesting that JC1 participate in the cleanup. JCI's potential liability arose separately from the use of the site by its Controls Group and its Globe Union operations. JCI participated and paid for response costs on behalf of its Controls Group but refused to pay on behalf of Globe Union. The PRP's brought a lawsuit against JCI for the Globe Union share in April, 1993 seeking to enforce **[13]** Globe Union's already existing obligation to participate in the remediation efforts.

These facts are supported in the record. This is a category four site.

¶25 Johnson Controls argues that NL-Portland (Gould) is both a category one site and a category two site. The trial court found it fell into category four because:

> A notice of potential liability was sent from the EPA to JCI, in January 1991 and a Special Notice Letter was sent from the EPA to JCI in July 1991. In January 1992, JCI received an Administrative

Order from the EPA requiring it and the other PRP's to implement the cleanup plan selected by the EPA. JCI allegedly refused to participate in the cleanup as required by the Administrative Order. As a result, one of the PRP's (Gould) filed a lawsuit to enforce the PRP's already existing equitable obligation to participate in the remediation plan.

The trial court's findings are supported by the record.

III. CONCLUSION

¶26 In sum, we conclude that the trial court did not err in finding that all twenty-one sites involved in this case fall into categories one, three, or four, and as a result are not "legal damages" entitled to insurance coverage under the CGL policies involved. Because we have so concluded, it is not necessary for us to address Wausau's counterclaim based on the pollution exclusion. Further, we need not address specifically the arguments of the additional (excess) insurance companies involved because we have affirmed the trial court's order that none of the sites involved here trigger coverage.

By the Court.—Order and judgment affirmed.

Recommended for publication in the official reports.

APPENDIX C

COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 1998

Marilyn L. Graves
Clerk of Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATE.

Nos. 95-1796 & 95-2591

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

95-1796
JOHNSON CONTROLS, INC.

PLAINTIFF-APPELANT,

v.

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL CO., F/K/A EMPLOYERS MUTUAL LIABILITY INSURANCE CO. OF WISCONSIN, AFFILIATED FM INSURANCE COMPANY, AIU INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY (AS SUCCESSOR TO NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY), AMERICAN EMPLOYERS' INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, AMERICAN INSURANCE COMPANY (THE), AMERICAN MOTORISTS INSURANCE COMPANY, CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA (THE), CONTINENTAL INSURANCE COMPANY

(THE), EMPLOYERS MUTUAL CASUALTY COMPANY, EMPLOYERS REINSURANCE CORPORATION, FEDERAL INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, LANDMARK INSURANCE COMPANY, LONDON MARKET (CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, AND LONDON [2] MARKET INSURANCE COMPANIES), NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NORTH STAR REINSURANCE CORPORATION, NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY (AS PREDECESSOR TO ALLSTATE INSURANCE COMPANY), PURITAN INSURANCE COMPANY (F/K/A THE MANHATTAN FIRE AND MARINE INSURANCE COMPANY), STONEWALL INSURANCE COMPANY, TRANSAMERICA PREMIER INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY (THE), UNITED NATIONAL INSURANCE COMPANY, ZURICH INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY AND WESTPORT INSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS,

ALLIANZ UNDERWRITERS INSURANCE COMPANY (F/K/A ALLIANZ UNDERWRITERS INC.), AMERICAN CENTENNIAL INSURANCE COMPANY, ASSOCIATED INTERNATIONAL INSURANCE COMPANY, AND LIBERTY MUTUAL INSURANCE COMPANY,

DEFENDANTS.

95-2591
JOHNSON CONTROLS, INC.

PLAINTIFF-APPELLANT-
CROSS-RESPONDENT,

v.

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL CO., F/K/A EMPLOYERS MUTUAL LIABILITY INSURANCE CO. OF WISCONSIN,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT,

[3] AFFILIATED FM INSURANCE COMPANY, AIU INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, (AS SUCCESSOR TO NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY), AMERICAN EMPLOYERS' INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, AMERICAN INSURANCE COMPANY (THE), AMERICAN MOTORISTS INSURANCE COMPANY, CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA (THE), CONTINENTAL INSURANCE COMPANY (THE), EMPLOYERS MUTUAL CASUALTY COMPANY, EMPLOYERS REINSURANCE CORPORATION, FEDERAL INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, HARBOR INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, LANDMARK INSURANCE COMPANY, LONDON MARKET (CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, AND LONDON MARKET INSURANCE COMPANIES), NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NORTH STAR REINSURANCE CORPORATION, NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY (AS PREDECESSOR TO ALLSTATE INSURANCE COMPANY), PURITAN INSURANCE COMPANY (F/K/A THE MANHATTAN FIRE AND MARINE INSURANCE COMPANY),

STONEWALL INSURANCE COMPANY, TRANSAMERICA PREMIER INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY (THE), UNITED NATIONAL INSURANCE COMPANY, ZURICH INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY, AND WESTPORT INSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS,

ALLIANZ UNDERWRITERS INSURANCE COMPANY (F/K/A ALLIANZ UNDERWRITERS INC.), AMERICAN CENTENNIAL INSURANCE COMPANY ASSOCIATED INTERNATIONAL INSURANCE COMPANY, CALIFORNIA UNION INSURANCE COMPANY INDUSTRIAL INDEMNITY COMPANY, INTERNATIONAL SURPLUS LINES INSURANCE [4] COMPANY, LIBERTY MUTUAL INSURANCE COMPANY AND REPUBLIC INSURANCE COMPANY,

DEFENDANTS.

APPEAL and CROSS-APPEAL from orders and judgments of the circuit court for Milwaukee County: GEORGE A. BURNS, JR, Judge. *Orders and judgments vacated on the appeal and the matter remanded with directions that a single global judgment be entered embodying the decision set out in part I of this opinion; judgment on the cross-appeal reversed and the matter remanded for further proceedings.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

FINE, J. These cases involve an appeal and cross-appeal. We discuss the appeal first.

I.

Johnson Controls appeals in 95-1796 from orders and judgments that dismissed its actions against various insur-

ance companies. Johnson Controls sought a court ruling that the insurance companies listed in the caption gave it environmental-cleanup coverage in connection with twenty-one contaminated landfill sites. Johnson Controls is alleged to be responsible for at least a part of the contamination at each of the sites. The insurance policies provide either primary or excess comprehensive general liability coverage and promise to defend and indemnify Johnson Controls for its liability for "damages." Some of the policies also use the phrase "for damages, direct or consequential, and expenses on account of" various covered risks, including "property damage." Still other policies use the phrases "loss" and "ultimate net loss," both of which, however, are [5] defined as money that Johnson Controls is legally obligated to pay "as damages." The trial court held that under *City of Edgerton* v. *General Casualty Co.*, 184 Wis.2d 750, 517 N.W.2d 463 (1994), *reconsideration denied*, 525 N.W.2d 736 (1994) (Table), *motion to vacate denied*, 190 Wis.2d 510, 527 N.W.2d 305 (1995), *cert. denied*, 514 U.S. 1017, costs of environmental-cleanup for which Johnson Controls might be liable were not "damages" under the policies. It is not clear whether all the orders and judgments are in accord with the following analysis. Accordingly, and to facilitate any further review, we remand this matter to the trial court for the entry of a global judgment, broken down into subparts that recite: (1) the property involved; (2) the insurance company or companies and the relevant dates of their policies that relate to that property; and (3) the result required by this opinion.

The trial court decided this case on summary judgment, and this appeal presents us with only issues of law. Accordingly, although we have been assisted by the trial court's written decision, our review is *de novo*. *See Green Spring Farms* v. *Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Johnson Controls's lawsuit was started in 1989, and, in an effort to keep our decision less cumbersome than the caption, we relate neither the procedural history nor facts that are not material to the legal issues presented by Johnson Controls's appeal.

The sites and related situations fall into four categories that are relevant to this appeal. The first category is where an insured who is responsible for the contamination cleans up the site pursuant to a directive issued by a government under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, commonly known by the acronym "CERCLA," 42 U.S.C. §§ 9601 *et seq.*, as amended by the Superfund Amendments and **[6]** Reauthorization Act of 1986, Pub. L. No. 99-499, or its state counterparts. The costs of this remediation are not "damages." *See City of Edgerton*, 184 Wis.2d at 782-786, 517 N.W.2d at 477-479; *see also Amcast Indus. Corp.* v. *Affiliated FM Ins. Co.*, No. 96-2968, slip op. at 10-13 (Wis. Ct. App. July 29, 1998, ordered published Aug. 26, 1998) (government-ordered response costs, non-owned property). Although Johnson Controls contends that *City of Edgerton* was decided wrongly, it does not dispute that the decision is dispositive in connection with the sites that fall into this first category, and that there is no insurance coverage in connection with its remediation of those sites.[1]

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[1] Johnson Controls argues that it "believes that *Edgerton*—decided by a bare 5-4 majority [*sic*, it was four to three—there are only seven justices on the Wisconsin Supreme Court] in the face of overwhelming contrary precedent from other jurisdictions—is bad law." We are, of course, bound by *City of Edgerton*, and thus do not discuss the voluminous material submitted by Johnson Controls in an attempt to get us to ignore *City of Edgerton*'s analysis of the crucial distinction between legal damages, for which there is coverage under the policies, and equitable monetary relief, for which there is not. *See Regent Ins. Co.* v. *City of Manitowoc*, 205 Wis.2d 450, 463-464, 556 N.W.2d 405, 409-410 (Ct. App. 1996).

Johnson Controls also argues that the insurance industry represented to insureds that the CGL policies would cover the types of damages alleged in this case, that this fact was not presented to the supreme court when it decided *Edgerton*, and that these representations therefore create a genuine issue of fact as to whether coverage exists under the policies. This same argument was raised and rejected in *Amcast Industrial Corp.* v. *Affiliated FM Insurance Co.*, No. 96-2968, slip op. at 15-16 (Wis. Ct. App. July 29, 1998, ordered published Aug. 26, 1998). We are bound by that decision and, therefore, reject Johnson Controls' argument for the reasons explained in *Amcast*.

The second category is where an insured is responsible for at least part of the contamination of a site that it does not own, but has not been directed by a government to remediate the site. A governmental agency has, however, directed others responsible for the contamination—either the site's owner or those who also polluted the property—to clean it up, and they sue the insured to recover the cleanup costs attributable to the insured. This situation is governed by [7] *General Casualty Co.* v. *Hills*, 209 Wis.2d 167, 561 N.W.2d 718 (1997), which held that an action by a non-governmental entity seeking those costs is a suit for "damages," for which there is coverage under the comprehensive general liability policies. *See id.*, 209 Wis.2d at 180, 561 N.W.2d at 724 ("[U]nlike *Edgerton*, neither the [Environmental Protection Agency] nor [Wisconsin Department of Natural Resources] have [*sic*] requested or directed [the insured/polluter] to develop a remediation plan or incur remediation and response costs under CERCLA or an equivalent state statute."); *see also Wisconsin Pub. Serv. Corp.* v. *Heritage Mut. Ins. Co.*, 209 Wis.2d 160, 561 N.W.2d 726 (1997) (site contaminated by subcontractor's negligence; subcontractor not directed by government to remediate site; direct action against subcontractor's insurance carrier by party remediatinng the property pursuant to government cleanup directive; held: suit for "damages"); *Spic & Span, Inc.* v. *Continental Cas. Co.*, 203 Wis.2d 118, 552 N.W.2d 435 (Ct. App. 1996) (site contaminated by insured; insured not directed by government to remediate site; action against insured by those remediating the property pursuant to government cleanup directive; held: suit for "damages"). Under *Hills*, there is insurance coverage in connection with this second category of sites.

The third and fourth categories present situations where the insured is responsible for at least part of the contamination of a site that it does not own, and *has* been directed by a government to remediate the site but has not done so. The insured is sued either by the government to recover money it spent to clean up the site, or by the site's owner or others also responsible for the contamination who cleaned up the site at the government's direction. In con-

nection with this appeal: Johnson Controls does not and did not own the contaminated sites falling within categories three and four; Johnson Controls is alleged to be responsible for at least [8] part of the contamination at those sites; Johnson Controls did not accede to a government demand that it remediate the contamination at those sites; and Johnson Controls is being sued by either the government or by private parties to recover the costs of the cleanup attributable to Johnson Controls.

On the surface, the scenarios encompassed by categories three and four would also seem to be resolved by existing precedent, *Regent Insurance Co.* v. *City of Manitowoc*, 205 Wis.2d 450, 556 N.W.2d 405 (Ct. App. 1996), which held that where the government sues "an insured to recover incurred cleanup costs under § 107(a)(4)(A) of the [Comprehensive Environmental Response, Compensation and Liability] Act, 42 U.S.C. § 9607(a)(4)(A), or to impose a plan for remediation, that action is not a 'suit for damages' but is, rather, a suit for 'equitable monetary relief,'" *id*, 205 Wis.2d at 463, 556 N.W.2d at 409 (quoting, among other authorities, *City of Edgerton*, 184 Wis.2d at 784, 517 N.W.2d at 478). Johnson Controls argues, however, that the supreme court's decision in *Hills* has tacitly overruled *City of Manitowoc* on this point. We disagree.

Hills concerned the contamination of a landfill site by waste from a service station. *Id.*, 209 Wis.2d at 171, 561 N.W.2d at 720. The United States sued the owner of the landfill site to force remediation of the site and for recovery of response costs. *Id.*, 209 Wis.2d at 172, 561 N.W.2d at 721. The station owner was not sued by the government and was not directed by the government to remediate the site. *Ibid.* The site's owner sued the service station's owner seeking reimbursement of the remediation costs attributable to the service station's waste. *Ibid.* The service station's insurance policies, which were akin to comprehensive general liability policies, *id.*, 209 Wis.2d at 172-173 n.9, 561 N.W.2d at 721 n.9, promised to pay "all sums" that the station "shall become legally obligated to pay as damages." *Id.*, 209 Wis.2d

at 173, 561 N.W.2d at 721. The trial court held that [9] the landfill owner's action to recover cleanup costs imposed on it by the government did not seek "damages," and, therefore, General Casualty was not obligated to defend the service station. *Id.*, 209 Wis.2d at 174, 561 N.W.2d at 721. We disagreed and reversed. *General Cas. Co.* v. *Hills*, 201 Wis.2d 1, 548 N.W.2d 100 (Ct. App. 1996). The supreme court affirmed.

The supreme court in *Hills* reiterated that the term "'damages' as used in an insurance policy 'unambiguously means legal damages.'" *Id.*, 209 Wis.2d at 177, 561 N.W.2d at 723 (quoting *School Dist of Shorewood* v. *Wausau Ins. Cos.*, 170 Wis.2d 347, 368, 488 N.W.2d 82, 89 (1992)). *Hills* then held that there was coverage because "regardless of the nature of the underlying claim made by the United States against [the landfill owner], the fundamental remedy [the landfill owner] seeks from [the service station owner] is compensatory damages for the past injuries he allegedly inflicted on the [landfill] site." *Id.*, 209 Wis.2d at 182, 561 N.W.2d at 725. This was consistent with the policy's purpose—"'to protect an insured against liability for negligent acts resulting in damage to third parties.'" *Id.*, 209 Wis.2d at 183-184, 561 N.W.2d at 725 (quoted source omitted).

In this case, unlike *Hills*, *Wisconsin Public Service*, and *Spic & Span*, but like *City of Manitowoc*, whose vitality subsequent to the supreme court's decision in *Hills* was recently reaffirmed, *see Hydrite Chemical Co.* v. *AEtna Cas. & Surety Co.*, 220 Wis.2d 26, 39 n.5, 582 N.W.2d 423, 429 n.5 (Ct. App. 1998), a property owner is not seeking "legal damages" for injury to its property by one who has either caused or contributed to the pollution. Rather, the government, and property owners forced by the government to clean up contamination allegedly caused by Johnson Controls, are seeking what *City of Edgerton* noted was "equitable monetary relief," that is recompense for monies [10] spent in complying with the nation's environmental-protection laws—*money that would have been spent by Johnson Controls if it had complied with the government's clean-up directives. See*

City of Edgerton, 184 Wis.2d at 784, 517 N.W.2d at 478 ("Response costs assigned either under CERCLA or secs. 144.442(8) and (9), Stats., are, by definition, considered to be equitable relief and reflect a congressional intent to differentiate between cleanup or response costs under 42 U.S.C. sec. 9607(a)(4)(A) and damages for injury, destruction, or the loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C)."); *see also City of Manitowoc*, 205 Wis.2d at 460-463, 556 N.W.2d at 408-409.

The only reason reimbursement is being sought from Johnson Controls under categories three and four is because: (1) Johnson Controls is alleged to have contaminated the sites; and (2) Johnson Controls did not voluntarily comply with directives that it remediate the contamination. If Johnson Controls *had* voluntarily complied with the directives, any assertion by it that its costs of compliance were "damages" would, as long as *City of Edgerton* remains the law in this state, be frivolous. The fact that Johnson Controls did not voluntarily comply does not transmute "equitable monetary relief"—which is not "damages"—into "legal damages" encompassed by the policies. *See Wisconsin Power & Light Co.* v. *Century Indemnity Co.*, 130 F.3d 787, 792 (7th Cir. 1997). The analysis in *Wisconsin Power & Light* is directly on point:

> If the [polluter] flouts its duty to clean up a contaminated site, forcing others who bear that duty to sue it for its fair share of the expense, and as a result is able to shift that cost from its own shoulders to those of its insurers, the consequence is to reward wrongdoing. That is something insurance contracts are never interpreted to do. They invariably and for obvious reasons refuse coverage of intentional wrongdoing.

Ibid. The trial court recognized this when it wrote:

> **[11]** If Johnson Controls' interpretation of *Edgerton* is correct, then a party responsible under a CERCLA directive to clean up contamination could opt to sit idly by, fail to remedy the site, and await

> the institution of a lawsuit by the government or another potential responsible party (PRP) and then tender the defense of the law suit to its insurer. This would produce the absurd result of rewarding one who does nothing and punishing the vigilant who undertake to comply with the environmental authorities.

We agree. Moreover, such a result would encourage delay, rather than foster the speedy clean up Congress and the state laws intended. The costs of remediation that Johnson Controls will have to pay under the scenarios in categories three and four are not "damages" under the policies, any more than these costs would have been "damages" had Johnson Controls paid them by complying with the government directives to remediate the sites—had it done so, it would not be subject to the claims for which it now seeks insurance coverage.

As noted in the beginning of this opinion, some of the policies express their coverage with the phrase "for damages, direct or consequential, and expenses on account of various covered risks, including "property damage." Still other policies use the terms "loss" and "ultimate net loss," both of which, however, are defined as money that Johnson Controls is legally obligated to pay "as damages." We reject Johnson Controls's argument that this phrasing provides coverage, even under *City of Edgerton*. This alternate language, like the word "damages" construed by *City of Edgerton*, limits, not expands, the coverage, and does not provide coverage for equitable monetary relief. *See Hydrite Chemical*, 220 Wis.2d at 40-43, 582 N.W.2d at 429-430; *see also Amcast*, slip op. at 13-15. There is no insurance coverage in connection with the scenarios encompassed by categories three and four.

[12] Based on the foregoing, we remand this matter to the trial court for the entry of a global judgment, broken down into subparts that recite: (1) the property involved; (2) the insurance company or companies and the relevant dates

of their policies that relate to that property; and (3) the result required by this opinion.

II.

Employers Insurance of Wausau cross-appeals in 95-2591 from the trial court's dismissal of its counterclaim against Johnson Controls. The counterclaim sought the following alternative relief: First, Employers Insurance asked for a declaratory ruling that an exclusion clause in its Johnson Controls policies freed it from having to indemnify or defend Johnson Controls for any Johnson Controls-caused pollution that was gradual over time. Recognizing that *Just* v. *Land Reclamation, Ltd.*, 155 Wis.2d 737 (*motion for reconsideration denied, opinion modified*, 157 Wis.2d 507), 456 N.W.2d 570 (1990), interpreted the clause to impose a duty to defend and indemnify an insured for gradual pollution, Employers Insurance alleged that it and Johnson Controls had bargained specifically for the exclusion and that it "embod[ied] their mutual intent to exclude from coverage under said policies all personal or property damage which arose out of gradual pollution." Second, Employers Insurance sought, in the alternative, reformation of the policies to reflect what the counterclaim describes as its agreement with Johnson Controls "that all liability policies beginning January 1, 1971, would exclude coverage for gradual pollution and [its] inten[t] and belie[f] that the wording of the pollution exclusion in the Wausau/Johnson Controls Pollution Exclusion Policies embodied and memorialized their mutual understanding and intent to exclude coverage for gradual pollution under these policies." The trial court dismissed the counterclaim, ruling that the issue of what **[13]** the clause meant had already been decided adversely to Employers Insurance's position by *Just*.[2] We reverse.

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[2] The trial court contended that it was bound by the doctrine of *stare decisis*, and Johnson Controls mirrors that contention on appeal in support of the trial court's ruling that *Just* v. *Land Reclamation, Ltd.*, 155 Wis.2d 737 (*motion for reconsideration denied, opinion modified*, 157 Wis.2d 507), 456 N.W.2d 570 (1990), prevents Employers Insurance from

Whether a complaint or, in this case, a counterclaim states a claim for relief presents a legal issue that we review *de novo*. *See Hausman* v. *St. Croix Care Ctr.*, 214 Wis.2d 654, 661, 571 N.W.2d 393, 396 (1997). The exclusion clause in the Employers Insurance contracts declared that there was no coverage for "personal injury or property damage arising out of" the "discharge, dispersal, release or escape" of various pollutants unless "such discharge, dispersal, release or escape is sudden or accidental." This is also the clause considered by *Just*. *Just*, 155 Wis.2d at 744, 456 N.W.2d at 572. The trial court in *Just* ruled that "the term 'sudden and accidental' did not apply to pollution damage occurring over a substantial period of time." *Ibid.* On appeal, we agreed and held that "the phrase 'sudden and accidental' unambiguously means accidental and immediate." *Ibid.* The supreme court reversed, holding that the phrase was "ambiguous." *Id.*, 155 Wis.2d at 746, 456 N.W.2d at 573. It then applied the maxim that "[w]hen ambiguous language appears in an insurance contract, we must construe the ambiguity in favor of the insured and against the insurance company that drafted the ambiguous language," noting that this was "especially true of exclusionary [14] clauses." *Ibid.* Applying that maxim, the supreme court interpreted "sudden and accidental" to mean "unexpected and unintended," rather than giving it a "temporal meaning." *Ibid.* *Just* also examined the drafting history of the phrase, noting that there was "substantial evidence indicating that the insurance industry itself originally intended the phrase to be construed as 'unexpected and unintended.'" *Id.*, 155 Wis.2d at 747, 456 N.W.2d at 573.

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attempting to prove the actual intent of itself and Johnson Controls in contracting for the insurance. *Stare decisis* is the doctrine that binds the highest court of a jurisdiction to its own decisions. *See, e.g., Payne* v. *Tennessee*, 501 U.S. 808, 827-830 (1991). This court and trial courts in this state are bound by decisions of the Wisconsin Supreme Court because of its position in the judicial hierarchy, and may never "overrule" those decisions. This is not true under the doctrine of *stare decisis*, which recognizes that the highest court in a jurisdiction may, consistent with that doctrine, overrule its prior decision. *See Payne*, 501 U.S. at 827-830.

It is black-letter law that courts "may examine extrinsic evidence as an aid to determining the meaning of contract language when an insurance contract is ambiguous." *Ibid.* It is also black-letter law that all facts that are alleged in a complaint or, in this case, a counterclaim, must be taken as true, and that "a claim should be dismissed as legally insufficient only if 'it is quite clear that under no conditions can the plaintiff recover.'" *Morgan v Pennsylvania Gen. Ins. Co.*, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979) (quoted source omitted); *see also Hausman*, 214 Wis.2d at 662, 571 N.W.2d at 396.[3] Here, Employers Insurance has alleged that irrespective of what the industry as a whole may have intended, and irrespective of how the supreme court may have interpreted the clause in *Just*, it and Johnson Controls agreed specifically that the clause would exclude from coverage "gradual pollution." *Just* did not decide the effect, if any, of the alleged Johnson Controls-Employers Insurance negotiations and agreements. Thus, neither the trial court nor we are bound by *Just*'s interpretation of the clause. Although it is true that unambiguous contractual language must be enforced as it is **[15]** written "even though the parties may have placed a different construction on it." *Cernohorsky* v. *Northern Liquid Gas Co.*, 268 Wis. 586, 593, 68 N.W.2d 429. 433 (1955), parol evidence may be used to discern the intent of parties to a contract where the language is ambiguous, *Kasten* v. *Markham*, 1 Wis.2d 352, 356, 83 N.W.2d 885, 887-888 (1957). *Kasten* expressed the universal rule:

> "Whenever the terms of a contract are susceptible of more than one interpretation, or an ambiguity arises, or the extent and object of the

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[3] The trial court ignored this principle by basing, at least in part, its decision to grant Johnson Controls's motion to dismiss Employers Insurance counterclaim on its finding that the "language in the pollution exclusion was not negotiated because it's standard form language." Of course, even "standard form language" can be used by the parties to express their bargained-for intent, even when this bargained-for intent differs from interpretations given to the language by others.

> contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract and to determine the object on which it was designed to operate."

Ibid. (quoted source omitted). Although "[a]n insurance policy must be construed in accordance with . . . what a reasonable person in the position of an insured would have understood the words to mean," *McPhee* v. *American Motorists Ins. Co.*, 57 Wis.2d 669, 676 205 N.W.2d 152, 156-157 (1973), insurance contracts are interpreted as are any other contracts; where the language is ambiguous, the court must try to ascertain the parties' actual intent—provisions in an insurance policy must be given the "meaning intended by the parties." *Kraemer Bros., Inc.* v. *United States Fire Ins. Co.*, 89 Wis.2d 555, 562, 278 N.W.2d 857, 860 (1979) ("The rules governing construction and interpretation of insurance policies are those applicable to contracts generally. The objective in interpreting and construing a contract is to ascertain the true intention of the parties."); *Kuehn* v. *Safeco Ins. Co. of America*, 140 Wis.2d 620, 626, 412 N.W.2d 126; 128 (Ct. App. 1987) ("Insurance contracts should be construed to effect the parties' true intent and the extent of policy coverage."). Moreover, where extrinsic evidence is offered, the construction of the ambiguous language is for the fact finder. *See Kraemer Bros.*, 89 Wis.2d at 561, 278 N.W.2d at 860. Employers Insurance has a **[16]** right to try to prove that Johnson Controls understood, intended, and contracted specifically for the clause to do what Employers Insurance contends it does.[4]

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[4] *McPhee* v. *American Motorists Insurance Co.*, 57 Wis.2d 669, 677, 205 N.W.2d 152, 157 (1973), upon which the trial court and Johnson Controls rely for the proposition that deference must be given to the insurance industry's construction of insurance-policy language is not on point because neither party to the insurance contract in that case attempted to introduce evidence of their actual intent. We also reject Johnson Controls's attempted use of the doctrine of "judicial estoppel," based on Employers Insurance's position in a discovery dispute before the trial court,

By the Court.—Orders and judgments vacated on the appeal and the matter remanded with directions that a single global judgment be entered embodying the decision set out in part I of this opinion; judgment on the cross-appeal reversed and the matter remanded for further proceedings.

Publication in the official reports is recommended.

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as a tool to prevent Employers Insurance from proving the actual, bargained-for intent underlying the policies' use of the "sudden and accidental" phrase in the pollution exclusion. Johnson Controls has not even made a colorable showing here for the application of judicial estoppel, which requires both the assertion of two "irreconcilably inconsistent" positions, and a "manipulative perversion of the judicial process." *See State* v. *Petty*, 201 Wis.2d 337, 353-354, 548 N.W.2d 817, 823 (1996). Additionally, the trial court's decision in the discovery dispute is not, as Johnson Controls argues, the "law of the case"—the order flowing from that decision was never the subject of an appellate ruling, *see Univest Corp.* v. *General Split Corp.*, 148 Wis.2d 29, 38, 435 N.W.2d 234, 238 (1989) ("decision on a legal issue by an appellate court establishes the law of the case"); *State* v. *Brady*, 130 Wis.2d 443, 446, 388 N.W.2d 151, 153 (1986) ("law of the case doctrine generally restrains a circuit court from reconsidering as order that an appellate court has affirmed"), and, moreover, a successor trial-court judge may always modify or reverse rulings made by a predecessor judge, *Dietrich* v. *Elliott*, 190 Wis.2d 816, 822, 528 N.W.2d 17, 20 (Ct. App. 1995).

APPENDIX D

STATE OF WISCONSIN CIRCUIT COURT BRANCH 2 MILWAUKEE COUNTY

JOHNSON CONTROLS, INC.

Plaintiff,

v. Case No. 89 CV 016174

EMPLOYERS INSURANCE OF WAUSAU, a mutual company, et al.,

Defendants.

[STAMP: COPY]

MEMORANDUM DECISION

This is a pollution case embodied in a declaratory judgment action filed by the Plaintiff, Johnson Controls. Before me is a motion by Employers Insurance of Wausau, the principal defendant, asking for a summary judgment of all claims filed by Johnson Controls.

Another primary insurer of Johnson Controls, Travelers Insurance, Inc., joins in Employers' motion. It should be noted that there are also numerous excess carriers, named as defendants, whom I earlier excused from participation in this motion on the theory that they would also be entitled to summary relief if Employers and Travelers should prevail on their motion. After studying Johnson Controls' brief opposing the motion, I may have been wrong in precluding their participation because Johnson Controls contends that

the language in the insuring agreements of the excess carriers may be substantially different than that of [2] their primary carrier. The status of these excess carriers in this case will be covered later in this decision.

I note parenthetically that, in order to decide this motion, I have been asked to study an "embarrassment of riches" in the form of numerous briefs and voluminous materials, both in support of and in opposition to the motion. Because of a personal indisposition in the nature of a torn retina and four subsequent surgical procedures, I advised all interested counsel that I would decide this motion without argument, which would give me some additional time to do justice to both sides. After reading the material, I cannot resist commenting how it never ceases to amaze me how different men often see the same subjects in entirely different lights.

Employers' thesis on its motion, very simply put, is that the recent Supreme Court decision in *City of Edgerton* v. *General Casualty Co.*, 184 Wis. 2d 750 (1994) is dispositive of this entire litigation.

There can be no doubt that the clear import of *Edgerton* is that under CERCLA (Comprehensive Environmental Response, Compensation and Liability Act of 1980), as amended by the Super Fund Amendments and Reauthorization Act of 1986 (SARA), codified at 42 U.S.C. Section 9601-9675) remediation or cleanup costs incurred by an owner of a hazardous waste site or by one who contributes to the contamination of a site are not damages, as that term is used in the insuring agreement of a comprehensive general liability insurance policy. Further, as discussed later, *Edgerton* also [3] decides that an insurer has no duty to defend an insured who is subjected to administrative cleanup directives from federal or state authorities pursuant to CERCLA or similar state statutes.

The proposition that "damages" as used in insurance policies unambiguously means legal damages was first clearly set forth in the *School District of Shorewood* v. *Wausau Insurance Co.*, 170 Wis. 2d 347 (1992). In that case, our

Supreme Court held that legal damages "is legal compensation for past wrongs or injuries and is generally pecuniary in nature." The term "damages" used in the context of such insuring agreement does not encompass the cost of complying with an injunctive decree.

In *Edgerton*, quoting from the *School District of Shorewood* case, our Supreme Court stated that the:

> 'limited construction of the term "damages" is consistent with the basic grant of coverage in the insurance policies. The insurers agreed to pay "all sums which the insured shall become legally obligated to pay *as damages*." The insurers did not agree to pay "*all sums* which the insured shall become legally obligated to pay." The addition of "as damages" serves as a qualifier, a limit to coverage.'

Edgerton goes on to state:

> "Consistent with conclusions of other courts, this court has concluded that if the term 'damages' is given a broader or more expansive interpretation, the phrase "as damages" would be rendered mere surplusage, since any expenses prior or incidental to litigation would be covered by the policies. *Id. See also Maryland Cas. Co.* v. *Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied* 484 U.S. 1008 (1988) ['if the term "damages" is given the broad, boundless connotations sought by the [insured], then the term "damages" in the contract . . . would become mere surplusage because any obligation to pay would be covered . . . .']; *Continental Ins.* v. *Northeastern* [4] *Pharmaceutical*, 842 F.2d 977 (8th Cir. 1988), *cert. denied sub nom. Missouri* v. *Continental, Insurance Cos.*, 488 U.S. 821 (1988) (Northeastern's CGL policies did not provide coverage for reimbursement of response costs under CERCLA; the phrase "as damages" is not ambiguous, since the plain meaning of the term as used in the insurance

context refers to legal damages and not equitable monetary relief).

> Response costs assigned either under CERCLA or secs. 144.442(8) and (9), Stats., are, by definition, considered to be equitable relief and reflect a congressional intent to differentiate between cleanup or response costs under 42 U.S.C. sec. 9607(a)(4) (A) and damages for injury, destruction, or the loss of natural resources under 42 U.S.C. sec. 9607(a)(4)(C). . . . Therefore as an equitable form of relief, response costs were not designed to compensate for past wrongs; rather, they were intended to deter any future contamination by means of injunctive action, while providing for remediation and cleanup of the affected site. This type of relief is distinct from that which is substitutionary - monetary compensation provided to make up for a claimed loss. *Shorewood School Dist.*, 170 Wis.2d at 369. Although the dissent takes the position that the insurers should be responsible for the response costs, the insurers never assumed a contractual responsibility to pay to remove hazardous materials and to prevent future harm."

Whether this writer agrees or disagrees with the Supreme Court's holding in *Shorewood* and *Edgerton*, it is the law of Wisconsin.

In order to be certain that all of Johnson Controls' claims are governed by *Edgerton*, I have meticulously studied the Matrix attached as a supporting document to Employers' motion. This exhibit lists all of the 21 landfill sites that are the subject of this action. I have compared that exhibit to the information contained in Exhibit "I", which is an exhibit attached **[5]** to Johnson Controls' second amended complaint. That exhibit contains a detailed summary of "allegations of environmental actions asserted against Johnson Controls for which coverage is sought in this lawsuit."

I have also examined the affidavit of Ms. Arlene Haas, one of Johnson Controls' counsel, and the affidavit of James T. Lucke and accompanying exhibits to make certain that all of the actions asserted against Johnson Controls seek recovery of CERCLA response costs. I am satisfied that, with the exception of two sites, Compton and Goshen, all of the claims against Johnson Controls, which emanate from the 19 other sites, are claims filed under CERCLA for response or remediation costs and, therefore, do not constitute "suits seeking damages" as that phrase is defined in *Edgerton.*

While it is true that the NL-Granite City and Auto Ion sites involve lawsuits in which the United States government is the plaintiff, the subject matter of the action does involve the recoupment of response costs under CERCLA. I conclude that because they involve response or remediation costs they are also governed by *Edgerton.*

In regard to the two lawsuits commenced by the government, I reject Johnson Controls' argument that such government action constitutes "a suit seeking legal damages". The predicate for this contention is that it is a court proceeding seeking money. From [6] this Johnson Controls argue that Employers must defend these actions and indemnify Johnson Controls if liability is determined. While it is true that this claim involves a lawsuit, recovery by the government would constitute merely a repayment of monies spent by it for remediation or cleanup costs. These monies under *Edgerton* are not legal damages and therefore Employers would not have to defend or indemnify its insured under the insuring agreement. I conclude therefore that Johnson Controls' contention that the Supreme Court's determination that "response costs are not damages within the meaning of the CGL policy is limited to so-called 'injunctive-like' response costs incurred to prevent *future* contamination of property" is without merit. I am puzzled by Johnson Controls' contention in this regard. On this motion they contend that the Supreme Court did not reach the issue of whether claims to recover response costs already incurred to clean up existing pollution constitute damages within the

meaning of the CGL policy. They put an entirely different spin on *Edgerton* now than they did in an amicus curiae brief in which they joined, which was submitted to the Supreme Court on *City of Edgerton*'s motion to reconsider.

If Johnson Controls' interpretation of *Edgerton* is correct, then a party responsible under a CERCLA directive to clean up contamination could opt to sit idly by, fail to remedy the site, and await the institution of a lawsuit by the government or another [7] potential responsible party (PRP) and then tender the defense of the lawsuit to its insurer. This would produce the absurd result of rewarding one that does nothing and punishing the vigilant who undertake to comply with the environmental authorities.

The other two sites, Sperling a/k/a Compton and Pinnely a/k/a Goshen, do involve lawsuits in which Johnson Controls is a named defendant. Because Employers has not been made a third-party defendant by Johnson Controls in either of those lawsuit, I decline to determine coverage in both those cases, leaving that determination to the trial judge in the event Employers is made a defendant in those actions.

I do note, however, that in the Sperling litigation, Employers was not even tendered the defense, and in the Goshen case it appears that the cause of action did not accrue during any policy period involved here.

I therefore interpret *Edgerton* to mean that it is the subject matter of the lawsuit (i.e. the recoupment of cleanup costs), and not the vehicle used to be indemnified, that is determinative of whether *legal* damages are involved.

I conclude that Employers Insurance of Wausau and Travelers Insurance Company are entitled to summary judgment dismissing Johnson Controls' complaint. I direct that their respective counsel prepare an order consistent with this opinion. Preliminary recitals in the order should reflect that the order is based upon [8] a memorandum decision concluding that all claims which are the subject of this action are governed by the rule announced in *Edgerton* that cleanup or remediation costs are not legal damages as that

term is used in the insuring agreements of the comprehensive general liability policies issued by Employers and Travelers to Johnson Controls.

In concluding as I do, I am not unmindful of Johnson Controls' voluminous materials filed in opposition to this motion which go to the question of what coverage the insurance industry intended to afford under C.G.L. policies. (See e.g. Leonard Silver's affidavit).

Because our Supreme Court has determined that the term "damages" is unambiguous, extrinsic evidence on the issue of intent is wholly irrelevant here.

Regarding the excess carriers, I note that one of them, North Star Reinsurance Corporation, has filed a reply memorandum in support of Employers Insurance of Wausau's motion for summary judgment. I am satisfied from a reading of the certificate of excess reinsurance attached to North Star's brief and the reinsuring agreement language contained in that certificate that North Star is entitled to the same relief as their underlying carrier, Travelers Insurance Company. I say this because they agree to "indemnify the reinsured against ultimate net loss arising out of the hazards covered and defined in the underlying [9] insurance". On the last page of the certificate under that section entitled Conditions, it is further provided that "the coverage provided by the certificate of reinsurance shall follow the reinsuring agreement's conditions and exclusions of the underlying insurance including any change by endorsements". Because the language of Travelers insuring agreements falls squarely within the *Edgerton* rationale, I do grant summary judgment to North Star Reinsurance Corporation for the same reason that I have granted judgment to its primary carrier in this decision. North Star's counsel should prepare an order consistent with this decision.

As to the remaining excess carriers who at my direction have not participated in these proceedings, I invite them to submit their reinsuring agreements to Johnson Controls' counsel and the Court with a brief statement, if warranted, why they are entitled to summary judgment also. If I am

satisfied that the language of the reinsuring agreement conditions their liability by language which is identical to or substantially the same as their underlying carrier then they will be entitled to the same relief as the movants are in this proceeding. If upon submission they are satisfied that they are entitled to summary judgment, they should also submit a proposed order to that effect.

The logistics involved in notifying all excess carriers of this decision is somewhat complicated by the fact that earlier in 1992 I granted summary judgment to fourteen defendants who had issued insurance policies on Globe Union sites. I am aware that this disposition does not necessarily mean that these companies **[10]** were excused from further participation in the lawsuit. I say this because there may be additional excess policies issued to Johnson Controls for their own sites. Accordingly, I have asked Mr. James Hauser, of the law firm of Crivello, Carlson, Mentkowski & Steeves, S.C., who is lead counsel for two carriers and local counsel for a number of other carriers, to disseminate this decision to all carriers who are still in this lawsuit.

I appreciate this accommodation because I am now confident that all interested parties will be privy to this decision and that the affected excess and umbrella carriers will be able to comply with my directives regarding appropriate disposition consistent with my decision.

Regarding Johnson Controls' "Motion of Revocation of Jonathan D. Jay's Admission to Practice Pro Hac Vice", I deem the motion moot in view of my disposition here. I, therefore, deny the motion without prejudice in the event this litigation is ever returned to this Court for further proceedings.

Dated at Milwaukee, Wisconsin, this 24th day of February, 1995.

BY THE COURT:

/s/
George A. Burns, Jr.
Circuit Judge

APPENDIX E

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JOHNSON CONTROLS, INC.

Plaintiff,

v. Case No. 89 CV 016174

EMPLOYERS INSURANCE OF WAUSAU, et al.,

Defendants.

[STAMP: FILED MAR 21 2001
JOHN BARRETT
Clerk of Circuit Court]

[STAMP: MAR 15 2001
$5.00 JUDGMENT FEE PAID]

JUDGMENT

Judgment is hereby entered in favor of defendants identified on Exhibit A and against Johnson Controls, Inc., 5757 North Green Bay Avenue, Milwaukee, Wisconsin 53209, dismissing all claims of Johnson Controls, Inc. with prejudice and dismissing all counterclaims without prejudice.

Costs are awarded as follows. Payment of costs in the amounts identified below shall be paid from the previously deposited funds currently held by the Court, and payment shall be sent to the counsel identified below.

[Chart omitted]

Dated this 21st day of March, 2001

* * * *

Totals Amended:

Principal	$160,383.36
Interest:	$64,502.70
Total:	$224,886.06

Judgment Clerk

BY THE COURT
JOHN BARRETT
CLERK OF CIRCUIT COURT
BY /s/ (Mary Dean)
JUDGMENT CLERK

BY THE COURT
JOHN BARRETT
CLERK OF CIRCUIT COURT
BY /s/ (Mary Dean)
JUDGMENT CLERK

EXHIBIT A TO JUDGMENT

[Exhibit omitted]

APPENDIX F

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JOHNSON CONTROLS, INC.

Plaintiff,

v. Case No. 89 CV 016174

EMPLOYERS INSURANCE OF WAUSAU, et al.,

Defendants.

[STAMP: FILED [illegible]]

ORDER FOR JUDGMENT

Based on the Court's July 19, 2000 Order applying Wisconsin law, all of plaintiff's claims in the above-referenced action are dismissed with prejudice. As a result of the Court's decision in the July 19, 2000 Order, the Court did not reach the counterclaims. Therefore, all counterclaims in the above-referenced action are dismissed without prejudice.

IT IS HEREBY ORDERED that judgment be entered dismissing all claims of Johnson Controls, Inc. with prejudice and dismissing all counterclaims without prejudice.

IT IS FURTHER ORDERED that costs be awarded in the amount already on deposit with the Court as follows:

Defendant	Principal	Interest	Total
Employers Insurance of Wausau	$71,888.68	$29,474.35	$101,363.03

[Remainder of chart omitted]

Dated this 13th day of March, 2001.

/s/ Michael P. Sullivan

APPENDIX G

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

JOHNSON CONTROLS, INC.

Plaintiff,

v. Case No. 89 CV 016174

EMPLOYERS INSURANCE OF WAUSAU, a mutual company, et al.,

Defendants.

[STAMP: COPY]

[STAMP: FILED JUL 19 2000
CLERK OF COURTS]

[STAMP: [illegible] JUL 21 2000]

PROPOSED ORDER

This matter comes before the Court on remand from the Court of Appeals with instructions for the entry of a global judgment, broken down into subparts that recite: (1) the property involved; (2) the insurance company or companies and the relevant dates of their policies that relate to that property; and (3) the result required by the Court of Appeals's opinion.

Based on the submissions of counsel, including the following documents: (1) Court of Appeals October 13, 1998 Order, (2) Site Summary Chart and Summary of Insurers'

Position on Coverage, (3) Johnson Controls' Site Summary Chart, (4) Supplemental Brief of Defendant-Respondent-Cross-Appellant Employers Insurance of Wausau Addressing *Edgerton* Issues, (5) Supplemental Brief of Appellant Johnson Controls, (6) Additional Submission, Per the Court's 1/13/98 Order, of Defendant-Respondent, Affiliated FM Insurance Company and Additional Appendix, (7) Additional Submission, Per the Court's 1/13/98 Order, of Defendant-Respondent, Employers Mutual Casualty Company and Additional Appendix, (8) Additional Submission, Per the Court's 1/13/98 Order, of Defendant-Respondent, Highlands Insurance Company and [2] Additional Appendix, (9) Additional Submission, Per the Court's 1/13/98 Order, of Defendant-Respondent, Stonewall Insurance Company, and Additional Appendix, (10) Supplemental Memorandum of Law of Defendant-Respondent The Travelers Indemnity Company, (11) Additional Submission, Per the Court's 1/13/98 Order, of Defendant-Respondent, United National Insurance Company, and Additional Appendix, (12) Additional Submission, Per the Court's 1/13/98 Order, of Defendant-Respondents, Westchester Fire Insurance Company and International Insurance Company, and Additional Appendix, (13) Additional Submission, Per the Court's 1/13/98 Order, of Defendant-Respondents, Zurich Insurance Company, and Additional Appendix, (14) Joinder of Defendants American Home Assurance Company, AIU Insurance Company, Granite State Insurance Company, Landmark Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA in the Briefs Filed by Employers Insurance of Wausau and Travelers Indemnity Company in Response to the Court's January 13, 1998 Order, and (15) Joinder of Defendant-Respondent First State Insurance Company to the Supplemental Brief of Defendant-Respondent-Cross Appellant Employers Insurance of Wausau Addressing Edgerton Issues; and based on the arguments of counsel and all pleadings and filings herein, the Court hereby finds and declares as follows:

[3]

Site	The Insurance Company or Companies and the Relevant Dates of Their Policies that Relate to the Site[1]	The Result Required by The Court of Appeals' Decision
Bergsoe Metal Corporation	Wausau contends that the following policy periods relate to the site: June 1983 to March 1986. JCI contends that the following policy periods relate to the site: all policies issued to JCI between 1983 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to JCI between 1983 and March 1986.	JCI received PRP letters dated February 1, 1988 from the United States Environmental Protection Agency ("EPA") and dated April 6, 1989 from the Oregon Department of Environmental Quality informing JCI that it had been identified as a potentially responsible party for contamination and asking the company to participate in site work. No lawsuit has been filed against JCI. Accordingly, the site falls within category one as de-

[1] To simplify matters, the Court has set forth in the table below the relevant periods that related to each site at issue. Appendix A to this Order lists the insurance companies, policy periods and policy numbers potentially at issue. Thus, the insurance company or companies and the relevant policy numbers of the policies at issue for each site can be derived by comparing the periods listed in the table below with the information in Appendix A. [Appendix A to this Order not reproduced in this Appendix.]

		scribed by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to this site.
[4] Keefe Environmental Services, Inc.	Wausau contends that the following policy periods relate to the site: September 1980. JCI contends that the following policy periods relate to the site: all policies issued to JCI between 1980 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to JCI between 1980 and 1985.	A letter from the Attorney General of the State of New Hampshire to Globe Union, Inc., dated March 17, 1982 identified JCI as a potentially responsible party at the site which is owned by a third party. A complaint, filed May 5, 1989, in *United Stales* v. *Clean Harbors of Natick, Inc.* v. *Johnson Controls, Inc.*, seeks enforcement of the PRPs' already existing equitable obligations to participate in remediation efforts. Accordingly, the site falls within category three as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with re-

		spect to the site.
NL - Dallas	Wausau contends that the following policy periods relate to the site: 1960 to September 1979. JCI contends that the following policy periods relate to the site: all policies issued to Globe Union between 1960 and 1985 and to JCI between 1978 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1960 and 1985 and to JCI between 1978 and 1985.	A PRP letter from the EPA was sent to Globe Union, Inc., dated July 10, 1984. Although a lawsuit was filed by NL Industries, Inc., that lawsuit was voluntarily dismissed in the fall of 1991. JCI did not pay NL for any response costs and Wausau provided a defense, under a reservation of rights agreement, to the claim. No lawsuits have been filed since. There is no active "suit" or "suit for damages" as defined by *Edgerton*. Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to the site.
[5] Tonolli Corporation	Wausau contends that the following policy periods relate to the site: November 1977 to October	JCI was informed by the EPA in various letters dated April 9, 1987, January 27, 1988

	1985. JCI contends that the following policy periods relate to the site: all policies issued to Globe Union between 1973 and 1985 and to JCI between 1978 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1973 and 1985 and to JCI between 1978 and 1985.	and August 12, 1988, that it had been identified as a potentially responsible party. No lawsuit has been filed against JCI. Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to this site.
NL - Pedricktown	Wausau contends that the following policy periods relate to the site: January 1973 to May 1982. JCI contends that the following policy periods relate to the site: all policies issued to Globe Union between 1973 and 1985 and to JCI between 1978 and 1985.	Globe Union received a letter requesting information on site use from the EPA, dated October 6, 1987. Although a lawsuit was filed by NL Industries, Inc., that lawsuit was voluntarily dismissed by NL in the fall of 1991. JCI did not pay NL for any response costs and Wausau pro-

	For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1973 and 1985 and to JCI between 1978 and 1985.	vided a defense, under a reservation of rights agreement, to the claim. An Administrative Order was issued by the EPA on April 1, 1992 to various PRPs, including JCI, to implement remediation plans. No lawsuits have been filed after NL's abandonment of its lawsuit. Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to this site.
[6] National Steal & Tube Distributors, Compton, CA	Wausau contends that the following policy periods relate to the site: August 1969 to December 1986. JCI contends that the following policy periods relate to the site: all policies issued to JCI between 1969 and 1985.	JCI received a letter from the County of Los Angeles, Department of Public Works, dated October 7, 1985 identifying JCL's potential liability for a gasoline spill. No "suit" and no "suit for damages" has been filed against JCI. Accordingly, the

	For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to JCI between 1969 and December 1986.	site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to this site.
Lakeland Disposal Services, Inc.	Wausau contends that the following policy periods relate to the site: November 1974 to 1978. JCI contends that the following policy periods relate to the site: all policies issued to JCI between 1974 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to JCI between 1974 and 1985.	A notice of potential liability was sent from the EPA to JCI, dated October 14, 1988. No lawsuit has been filed. Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to this site.
JCI - Atlanta	Wausau contends that the following policy periods relate to the site: 1955 through January 1987. JCI contends that the following policy	A Consent Order regarding cleanup of JCL's plant site, dated November 16, 1988, was entered voluntarily between the Georgia Department of Natural Resources,

	periods relate to the site: all policies issued to Globe Union between 1955 and 1985 and to JCI between 1978 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1955 and 1985 and to JCI between 1978 and 1987.	Environmental Protection Division and JCI. No lawsuit has been filed against JCI with respect to the site. Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to this site.
[7] Auto-Ion	Wausau contends that the following policy periods relate to the site: 1969 to 1971. JCI contends that the following policy periods relate to the site: all policies issued to JCI between 1969 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to JCI between	A PRP letter was sent from the EPA to Penn Controls, Inc. c/o Johnson Controls, dated November 28, 1984. The government filed a complaint on August 23, 1990 raising a direct claim against JCI for reimbursement of response costs and seeking reimbursement for response costs and seeking enforcement of a remediation plan. The site is owned by a third

	1969 and 1985.	party. Accordingly, the site falls within category three as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to the site.
Bay Drums	Wausau contends that the following policy periods relate to the site: August 1962 and December 1967. JCI contends that the following policy periods relate to the site: all policies issued to Globe Union between 1962 and 1985 and to JCI between 1978 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1962 and 1985 and to JCI between 1978 and 1985.	A notice of potential liability was sent from the EPA to Globe Union, Inc. dated February 2, 1988. No lawsuit has been filed. Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to this site.

Maxey Flats Nuclear Disposal	Wausau contends that the following policy periods relate to the site: January 3, 1973. JCI contends that the following policy periods relate to the site: all policies issued to JCI between 1973 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to JCI between 1973 and 1985.	The EPA sent a PRP letter to JCI, dated November 26, 1986. No lawsuit has been filed. Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCL exists with respect to this site.
[8] JCI - Owosso	Wausau contends that the following policy periods relate to the site: 1972 to the present. JCI contends that the following policy periods relate to the site: all policies issued to Globe Union between 1972 and 1985 and to JCI between 1978 and 1985. For purposes of this Order only, the	JCI voluntarily undertook efforts to close a wastewater lagoon on its plant property, with approval of state and federal environmental authorities. No lawsuit has been filed. Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to

	Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1972 and 1985 and to JCI between 1978 and 1985.	the site.
NL - Atlanta (National Smelting & Refining)	Wausau contends that the following policy periods relate to the site: late 1950's to December 1984. JCI contends that the following policy periods relate to the site: all policies issued to Globe Union between 1950 and 1985 and to JCI between 1978 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1950 and 1985 and to JCI between 1978 and 1985.	A letter was sent from the EPA to JCI requesting information dated January 24, 1990. A PRP letter was sent from the EPA to JCI, dated January 31, 1991 and an Administrative Order was received from the EPA on July 15, 1991. No lawsuit has been filed. Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to the site.

[9] NL - Portland (Gould)	Wausau contends that the following policy periods relate to the site: 1962 to 1965; July 1976 to February 1979. JCI contends that the following policy periods relate to the site: all policies issued to Globe Union between 1962 and 1985 and to JCI between 1978 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1962 and 1985 and to JCI between 1978 and 1985.	A notice of potential liability was sent from the EPA to JCI, in January 1991 and a Special Notice Letter was sent from the EPA to JCI in July 1991. In January 1992, JCI received an Administrative Order from the EPA requiring it and the other PRP's to implement the cleanup plan selected by the EPA. JCI allegedly refused to participate in the cleanup as required by the Administrative Order. As a result, one of the PRP's (Gould) filed a lawsuit to enforce the PRP's already existing equitable obligation to participate in the remediation plan. Accordingly, the site falls within category four as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI ex-

		ists with respect to the site.
NL - Granite City	Wausau contends that the following policy periods relate to the site: January 1962 to September 1982. JCI contends that the following policy periods relate to the site: all policies issued to Globe Union between 1962 and 1985 and to JCI between 1978 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1962 and 1985 and to JCI between 1978 and 1985.	A General Notice of potential liability letter was sent from the EPA to JCI, dated November 28, 1989, and a Special Notice letter was sent from the EPA to JCI dated June 25, 1990. A Section 106 order was issued on November 30, 1990 and on July 31, 1991 U. S. filed suit directly against JCI and various other parties, in *United States* v. *NL Industries*, No. 91CV00578 (S.D. Ill.) for cost recovery and enforcement of the Administrative Order. No other lawsuits have been filed. Accordingly, the site falls within category three as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to the site.

[10] USS Lead Refinery, Inc.	Wausau contends that the following policy periods relate to the site: January 1974 to September 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1974 and 1985 and to JCI between 1978 and 1985.	Requests for information were sent to JCI from EPA dated September 23, 1991 and November 5, 1991. No lawsuit has been filed. Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to the site.
Union Scrap Iron & Metal Company, Inc.	Wausau contends that the following policy periods relate to the site: May 1978 to April 1981. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between May 1978 and 1985 and to JCI between May 1978 and 1985.	In March 1990, the United States amended an ongoing cost recovery action to include direct claims against JCI. *United States* v. *Union Scrap*, No. 4-89-40 (U. S. D. Ct. MN). Accordingly, the site falls within category three as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to the site.

Bennington Landfill	Wausau contends that the following policy periods relate to the site: 1969 to 1987. JCL contends that the following policy periods relate to the site: all policies issued to Globe Union between 1969 and 1985 and to JCI between 1978 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1969 and 1985 and to JCI between 1978 and 1985.	General request for information was sent to JCI from the EPA on August 29, 1990. JCI entered into an Administrative Consent Order in 1991. No lawsuit has been filed. Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to the site.
[11] Delaware Sand & Gravel	Wausau contends that the following policy periods relate to the site: 1972 to 1976. JCI contends that the following policy periods relate to the site: all policies issued to Globe Union between 1972 and	An Amended Complaint was filed against JCI on December 28, 1990 by the *United States in United States* v. *Hercules Inc., et. al.*, C.A. No. 89-562-LON raising a direct claim by the government for cleanup. Accord-

	1985 and to JCI between 1978 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Globe Union between 1972 and 1985 and to JCI between 1978 and 1985.	ingly, the site falls within category three as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to the site.
Hunt's Disposal Landfill	Wausau contends that the following policy periods relate to the site: Globe Union 1962 to 1969; Controls Group from 1963 to 1974. JCI contends that the following policy periods relate to the site: all policies issued to Globe Union between 1962 and 1985; to Penn Controls between 1963 and 1985; and to JCI between 1968 and 1985. For purposes of this Order only, the Court will assume that the following	A Special Notice Letter dated July 31, 1991 was sent from the EPA to JCI requesting that JCI participate in the cleanup. JCI's potential liability arose separately from the use of the site by its Controls Group and its Globe Union operations. JCI participated and paid for response costs on behalf of its Controls Group but refused to pay on behalf of Globe Union. The PRP's brought a lawsuit against JCI for the Globe Union share in April, 1993

	policies relate to the site: all policies issued to Globe Union between 1962 and 1985; to Penn Controls between 1963 and 1985; and to JCI between 1968 and 1985.	seeking to enforce Globe Union's already existing obligation to participate in the remediation efforts. Accordingly, the site falls within category four as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to the site.
[12] JCI - Goshen	Wausau contends that the following policy periods relate to the site: 1968 to present. JCI contends that the following policy periods relate to the site: all policies issued to Penn Controls between 1968 and 1985 and to JCI between 1968 and 1985. For purposes of this Order only, the Court will assume that the following policies relate to the site: all policies issued to Penn Con-	JCI voluntarily undertook cleanup of its own property. No lawsuit regarding JCI's cleanup costs has been filed. (This site also involved a separate claim against JCI by a neighboring property owner who alleged bodily injury as a result of his exposure to pollutants. The plaintiff's alleged exposure to the pollutants began in October 1986, after the expiration of all policies involved in this appeal. However, the trial court

	trols between 1968 and 1985 and to JCI between 1968 and 1985.	dismissed this claim without prejudice and this claim is not part of this action.) Accordingly, the site falls within category one as described by the Court of Appeals and, therefore, no duty to defend or indemnify JCI exists with respect to the site.

[13] The disposition of the issues above fully resolve all of the claims raised in JCI's Amended Complaint, filed September 21, 1999, and said complaint therefore is dismissed in its entirety.

LET JUDGMENT BE SO ENTERED ACCORDINGLY.

By the Court

/s/ Michael P. Sullivan

APPENDIX H

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September 18, 2003

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You are hereby notified that the Court has entered the following order:

#01-1193 Johnson Controls v. Employers Ins. of Wausau, et al.
L.C. # 89CV016174

The court having considered the Motion for Reconsideration, and the Motions for Leave to File Non-Party Briefs,

IT IS ORDERED that the Motions for Leave to File Non-Party Briefs are granted.

IT IS FURTHER ORDERED that the Motion for Reconsideration is denied, with $50 costs,

Wilcox and Bradley, JJ., dissent.

Abrahamson, C.J., and Roggensack, J., did not participate.

Cornelia G. Clark
Clerk of Supreme Court

APPENDIX I

SUPREME COURT
OF WISCONSIN

* * * *

JOHNSON CONTROLS' PETITION FOR REVIEW

* * * *

I. STATEMENT OF ISSUES

1. Does the identity of the claimant as a government or non-government party determine coverage for environmental cleanup costs under a comprehensive general liability ("CGL") insurance policy indemnifying an insured for "damages"?

   Answered below: The Court of Appeals ruled that there was no coverage for suits or claims brought by the government seeking cleanup costs.

2. Is CGL insurance coverage for cleanup costs forfeited if the insured has, at any time and in any manner, been "contacted" by the government regarding alleged contamination?

   Answered below: The Court of Appeals ruled that any kind of "contact" by the government was sufficient to cause an insured to forfeit coverage in any subsequent suit seeking recovery of cleanup costs.

3. What is the procedural mechanism for determining which covered or non-covered "category" applies for a given Superfund site?

   Answered below: The Court of Appeals applied a "clearly erroneous" standard of review to the trial court's verbatim entry of a "proposed order" submitted by one of the parties on a disputed summary judgment-style record.

4. Should *City of Edgerton* v. *General Casualty Co.*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994) be overruled in light of the "arbitrary" and "debatable" distinc-

tions it has produced and the discrediting of authorities upon which it relied?

Answered below: The Court of Appeals obviously could not, and did not, overrule *City of Edgerton*. It did, however, give it the broadest application possible, and narrowly limited this Court's later decision in *General Casualty Co.* v. *Hills*, 209 Wis.2d 167, 561 N.W.2d 457 (1997) to its specific facts.

II. STATEMENT OF CRITERIA WARRANTING REVIEW

Johnson Controls requests Supreme Court review of two Court of Appeals' decisions that collectively established that there is no insurance coverage for any [2] of 21 environmental sites at which Johnson Controls faced (or faces) substantial liability. In the first decision, the Court of Appeals interpreted a series of decisions from this Court, the Court of Appeals and the Seventh Circuit to devise a generic framework for resolving environmental insurance coverage disputes. That framework classifies environmental sites into one of four categories depending on the form of relief being sought by the claimant and whether the insured had previously received a government "directive."

The framework did not specifically address a number of substantive issues, including what, if any, effect the identity of the claimant should have and what constitutes a "directive" that would cause an insured to forfeit coverage. The Court of Appeals also did not spell out the procedure or standards by which trial courts were to decide these issues. In other words, the four categories created by the Court of Appeals left unanswered questions. Those questions have now been addressed in a second Court of Appeals decision that has been recommended for publication. And the answers are troubling.

It is now the law of this state that an insured who is sued by a private, non-government party for cleanup costs has coverage, while an insured sued by the government for those same costs does not. It is now the law of this state

that an insured who receives a letter from the government requesting information *and complies with the request* forfeits coverage, even as against a private party who performs a cleanup and sues the insured for damages. Why? Because somehow that insured is engaged in "intentional wrongdoing" by disregarding a government [3] "directive." It is now the law of this state that an insured who is sued by the government for *past* costs incurred by the government has disregarded a "directive" to perform a cleanup—a cleanup that was already performed when the suit was received. And it is now the law of this state that trial courts should apply these standards by conducting a "trial by affidavit" that will then be reversed only if the decision is "clearly erroneous."

The Court of Appeals noted that the "distinctions" it drew were "arbitrary"—but required by this Court's precedent. In fact, the Court of Appeals incorrectly applied this Court's precedent, most notably *City of Edgerton* v. *General Casualty Co.*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994) and *General Casualty Co.* v. *Hills*, 209 Wis. 2d 167, 561 N.W.2d 457 (1997). Review is therefore necessary because the Court of Appeals' decision is in conflict with controlling opinions of this Court. Wis. Stat. § 809.62(d). Further, if the Court of Appeals' decision does reflect a fair reading of the current precedent of this Court, we believe the results reached were never intended by this Court—in other words, that this Court never intended to create "arbitrary" distinctions that are illogical and contrary to basic tenets of contract law, insurance law and public policy. Wis. Stat. § 809.62(e).

In any event, this case offers the opportunity for this Court to develop, clarify and harmonize the law of environmental insurance coverage under a standard CGL policy in frequently recurring factual scenarios. Wis. Stat. § 809.62(c). This case concerns multiple sites involving the full range of [4] circumstances existing at Superfund sites. Supreme Court review will bring clarity—and perhaps finality—to this confusing and controversial area of law.

* * * *

[26] D. *Edgerton*'s "Damages" *Dictum* Should be Overruled Because Wisconsin Now Stands Virtually Alone in Finding that CERCLA Response Costs Are Not "Damages" and Because the Cases It Relied Upon Are No Longer Good Law.

The Court of Appeals flawed framework, and its equally flawed application, encompass the kind of "debatable judicial distinctions" that Chief Justice Abrahamson's concurring opinion in *Hills* said would best be avoided by expressly overruling *Shorewood* v. *Wausau Ins. Co.*, 170 Wis. 2d 347, 488 N.W.2d 82 (1992), the decision upon which *Edgerton* was based. Johnson Controls agrees. Indeed, for the reasons shown below it is by no means necessary that the Court overrule *Shorewood* to overrule *Edgerton*. But the Court really **[27]** *should* overrule *Edgerton* and bring Wisconsin back into step with its own insurance law precedent, as well as the overwhelming majority of courts in other jurisdictions.

* * * * **[30]** * * * *

The overwhelming majority of courts from other jurisdictions have continued to reject the reasoning employed in *Edgerton*. *See e.g.*, *Compass Insurance Co.* v. *City of Littleton*, 984 P.2d 606, 622 (Colo. 1999) ("we similarly join the many other jurisdictions that have held that government mandated response or cleanup costs under CERCLA constitute "damages" as that term is used in the insurance policies."); *See also Quaker State Mini-Lube, Inc.* v. *Fireman's Fund Insurance Co.*, 868 F. Supp. 1278, 1288-89, 1291 (D. Utah. 1994) **[31]** (collecting cases). The reason is not hard to fathom—*Edgerton*'s rationale is flawed, as the eight years of "arbitrary" and "debatable" distinctions it has produced amply demonstrates. *Edgerton*'s "damages" *dictum* should be overruled.

V. CONCLUSION

For the foregoing reasons, Johnson Controls requests that this Petition be granted.

* * * *

SUPREME COURT
OF WISCONSIN

* * * *

JOHNSON CONTROLS' BRIEF AND APPENDIX

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* * * *

I. STATEMENT OF ISSUES

A. Should the "damages" dictum in *City of Edgerton* v. *General Casualty Co.*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994), be overruled in light of its inconsistencies with prior Wisconsin law, the "arbitrary" and "debatable" distinctions it has produced, and the contrary decisions in the overwhelming majority of other jurisdictions?

B. In applying its four-category framework, did the court of appeals err in (1) finding that the identity of the claimant determines coverage under a comprehensive general liability ("CGL") insurance policy; (2) finding CGL coverage is forfeited if the insured has been "contacted" by the government; and (3) applying a "clearly erroneous" standard of review to the trial court's verbatim entry of a "proposed order"?

* * * *

[41] C. Johnson Controls Is Entitled to Judgment on Liability

If *Edgerton* is overruled, Johnson Controls is entitled to judgment on liability for cleanup costs at each of the 19 sites

at issue in this case—the only issue left would be the amount and allocation of damages. Such a judgment **[42]** should include dismissal of the counterclaim pleaded by one of the insurers, Wausau, that sought reformation of the policies on the basis that the parties bargained for a "pollution exclusion" that would have a different meaning than that found by this court in *Just* v. *Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W. 2d 570 (1990). The trial court originally dismissed this claim on the pleadings; the court of appeals in *Johnson Controls I* reversed, in the process eviscerating this Court's holding in *Just*. (A-Pt 065-069).

On remand Johnson Controls moved for summary judgment, on the grounds that there was no evidence to support the pleaded reformation claim. R. 1057, pp. 28-30. Wausau came forward with no evidence to support its pleaded allegations that the parties in this case agreed to an interpretation of the "pollution exclusion" different than that decided in *Just*. The motion was rendered moot by the trial court's "Proposed Order" but was otherwise not addressed. Given Wausau's failure to raise any issue of fact showing the parties' intent at the time of contracting, that issue should now be resolved in Johnson Controls' favor, and the case remanded for entry of judgment on liability.

IV. CONCLUSION

For the foregoing reasons, Johnson Controls asks that the court of appeals decision be reversed, that *Edgerton* be overruled and that this case be remanded for judgment in Johnson Controls' favor on liability and further proceedings consistent with the Court's opinion.

* * * *

SUPREME COURT
OF WISCONSIN

* * * *

JOHNSON CONTROLS' REPLY BRIEF

* * * *

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I. *STARE DECISIS* DOES NOT REQUIRE THAT THIS COURT MAINTAIN THE ARBITRARY DISTINCTIONS NECESSARY TO KEEP *EDGERTON'S* "DAMAGES" RATIONALE IN PLACE

The insurers misstate the extent to which *stare decisis* is at issue here, as well as the circumstances that compel a limited departure from that doctrine in this case.

Johnson Controls' position does *not* require this Court to "overturn four of its recent decisions." *Edgerton*[1] improperly applied the damages classification scheme in *School District of Shorewood* v. *Wausau Insurance Companies*, 170 Wis. 2d 347, 488 N.W.2d 82 (1992) because CERCLA response costs—regardless to whom or how paid—represent costs to repair past property damage, as opposed to costs of conforming future conduct to comply with an injunction. *Edgerton* violated *Shorewood's* controlling principle that courts look to the underlying "nature" of requested relief rather than the "form" in which sought.

General Casualty Co. v. *Hills*, 209 Wis. 2d 167, 561 N.W.2d 718 (1997) and its companion, *Wisconsin Public Service Corp.* v. *Heritage Mut. Ins. Co.*, 209 Wis. 2d 160, 561 N.W.2d 726 (1997)—two other decisions the insurers claim would be "overturned"—support Johnson Controls' position. *Edgerton*'s flaws were seemingly recognized in *Hills*, where this Court found that CERCLA response costs were covered, despite *Edgerton*. *Hills* had no need to expressly overrule *Edgerton* and did not do so. But *Hills*' reasoning—[2] that "the cost of repairing and restoring damaged property and water to its original condition is a proper measure of damages," *Hills, 209 Wis. 2d at 181*—cannot be squared with *Edgerton's* rationale, that the "nature" of such costs is "equitable". A decision finding complete coverage here extends *Hills* to its logical conclusion.

Moreover, confined to its facts, *Edgerton*[2] holds that a PRP letter is not a "suit" so as to trigger an insurer's duty to defend. *Edgerton* could also be read to preclude coverage for the so-called "owned property" sites, and *Hills* could be read as limiting *Edgerton* to just that scenario. *See Hydrite*

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[1] *City of Edgerton* v. *General Cas. Co.*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994).

[2] Whether technically *dicta* or a holding, the Court's rationale for concluding environmental response costs are not "damages" is ripe for reversal as discussed below.

Chemical Co. v. *Aetna Cas. & Sur. Co.*, 220 Wis. 2d 26, 44, 582 N.W.2d 423 (Ct. App. 1998) (Roggensack, J. dissenting).

To be sure, finding coverage for the so-called "Category 1" sites would leave no doubt that *Edgerton's* reasoning on "damages" is eviscerated. But the alternative—that there is coverage for CERCLA damage awards and settlements paid after a party is sued (but only if the plaintiff is not the government), while there is no coverage for pre-suit, self-funded clean-ups and settlements—ignores well-established principles of contract law allowing contracting parties to recover mitigation costs from a party that breaches or anticipatorily breaches (*i.e.*, insurers who ignore their insured's notice of a covered event). It ignores the insurance law principles authorizing insureds to [3] resolve claims before they ripen into lawsuits, once the insurer denies coverage. It ignores common sense and insureds' reasonable expectations, neither of which permits the "nature" of relief as "damages" to turn on the identity of the claimant. And it ignores the public policy concerns with a rule that discourages insureds from voluntarily resolving environmental liability at the pre-suit demand stage.

Wausau would have the Court deny coverage based purely on the identity of the claimant as "government"—once the government "contacts" you, there can never be coverage. But nowhere in its brief does Wausau offer a logical rationale for such a rule. Indeed, such a rule would ironically mean that CERCLA natural resource damage suits—which are always brought by the government and which *Edgerton* cited as an example of what *are* "damages"—are not covered.

Stare decisis should not compel this Court to cling to these strange and troubling distinctions. This Court has never hesitated to abandon established precedent when it proves to be wrong. *See, e.g., State v. Outagamie Cy. Bd. of Adjustment*, 244 Wis. 2d 613, 628 N.W.2d 376 (2001); *Aicher v. Wis. Patients Compensation Fund*, 237 Wis. 2d 99, 613 N.W.2d 849 (2000); *State v. Field*, 118 Wis. 2d 269, 347 N.W.2d 365 (1984). As Travelers acknowledges, *stare de-*

cisis is trumped under at least three circumstances: (1) changes or developments in the law that undermine the rationale behind a decision; (2) the need to make a decision correspond to newly ascertained facts; or (3) a [4] showing that the precedent has become detrimental to coherence and consistency in the law. *State v. Stevens*, 181 Wis.2d 410, 511 N.W.2d 591 (1994). Any of these circumstances justifies a departure from *stare decisis*. All three exist here.

* * * *

[11]On a broader level, there is an obvious—and eminently correct—solution to the quagmire that environmental insurance law has become in this State. Clean-up costs incurred to restore third-party property should be [12] covered, without regard to the stage or form of proceedings in which they are sought.

Dated this 29th day of July, 2002

* * * * *

Supreme Court, U.S.
FILED
MAR 24 2004
OFFICE OF THE CLERK

(3)

No. 03-1199

IN THE

Supreme Court of the United States

EMPLOYERS INSURANCE COMPANY OF WAUSAU,

Petitioner,

v.

JOHNSON CONTROLS, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

RESPONDENT JOHNSON CONTROLS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 15.2, Johnson Controls objects to the question presented by the Petition because it does not accurately reflect the proceedings below. If this Court grants the Petition, the following would be an additional question that the Court would need to address prior to reaching the issue raised by the petitioner:

DID THE WISCONSIN SUPREME COURT, IN FACT, RULE *SUA SPONTE* THAT A GOVERNMENT "PRP LETTER" SEEKING AN ENVIRONMENTAL CLEAN UP WAS A "SUIT" TRIGGERING AN INSURER'S DUTY TO DEFEND WHEN (1) JOHNSON CONTROLS BROADLY SOUGHT REVIEW OF THE CONTINUING VIABILITY OF A PRIOR DECISION ADDRESSING THAT QUESTION, WITHOUT LIMITATION ON WHAT PORTIONS OF THAT DECISION WERE THE SUBJECT OF THE PETITION, (2) ALL BRIEFS SPECIFICALLY RAISED AND ADDRESSED WHY INSURANCE COVERAGE SHOULD OR SHOULD NOT DEPEND ON THE EXISTENCE OF A LAWSUIT, (3) THE CO-DEFENDANTS / CO-RESPONDENTS' COORDINATED RESPONSE BRIEFS EXPRESSLY ARGUED THAT A "PRP LETTER" WAS NOT A "SUIT" AND (4) THE "PRP LETTER AS SUIT" ARGUMENT WAS EXPRESSLY MADE BY BOTH SIDES DURING ORAL ARGUMENT?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent states that it has no parent corporation, nor does any publicly held company own 10% or more of its stock.

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STATEMENT OF THE CASE

A. Nature of this Case

This Petition arises out of a 15 year old environmental insurance coverage dispute involving the interpretation of comprehensive general liability ("CGL") insurance policies issued to Johnson Controls, Inc. ("Johnson Controls"). Johnson Controls filed suit in 1989 seeking insurance coverage for amounts it paid or would have to pay for third party property damage, including actual and potential claims under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), and state law equivalents. The defendants, including the petitioner, Employers Insurance Company of Wausau ("Wausau"), were numerous insurance companies who had issued CGL policies providing primary and excess liability coverage to Johnson Controls over a 40 year timeframe. Wausau was one of two "primary" insurers, the other being Travelers Indemnity Company ("Travelers"). The underlying liabilities for which coverage was sought arose out of alleged contamination at 21 separate sites.

B. *City of Edgerton v. General Casualty Co.* and Its Progeny

Five years into this case, the Supreme Court of Wisconsin decided *City of Edgerton v. General Casualty Co.*, 517 N.W.2d 463 (Wis. 1994), *cert. denied* 514 U.S. 1017 (1995), in which it held that costs incurred in responding to property damage caused by environmental contamination were not "damages" and that a letter from a government agency identifying the recipient as a "potentially responsible party" under CERCLA and demanding that it initiate a clean-up (known as a "PRP letter") was not a "suit" triggering an insurer's duty to defend.

Relying on *Edgerton*, the trial court dismissed Johnson Controls' lawsuit. Johnson Controls appealed. In the meantime, Wisconsin law in this area continued to evolve. As explained by the Wisconsin Supreme Court in the decision on which review is sought, *Edgerton* was flawed in many ways, and was immediately and strongly criticized in Wisconsin and across the country. (App. 53a-54a). *Edgerton*'s flaws were particularly acute, and obvious, in cases where an insured was joined in a third party lawsuit seeking clean-up costs under 42 U.S.C. §§ 9607 and 9613 — the notion that a claim for monetary reimbursement of costs incurred to repair damaged property was not a claim for "damages" under a liability insurance policy seemed impossible to square with basic tort and insurance law principles. (App. 27a). Ultimately, the Wisconsin Supreme Court decided that *Edgerton* did not apply where the insured faced a lawsuit seeking previously incurred costs. *General Cas. Co. v. Hills*, 561 N.W.2d 718 (Wis. 1997). However, rather than overrule *Edgerton*, the court distinguished it, stating that *Edgerton* continued to stand for the proposition that "receipt of a letter from the EPA or DNR requesting a party to propose a remediation plan does not constitute a 'suit seeking damages'." *Hills*, 561 N.W.2d at 725.[1]

Taken together, *Edgerton* and *Hills* meant that insureds who cleaned up environmental contamination themselves did not have coverage, while those sued by third parties for the same type of clean-up costs did have coverage. An anomalous

[1] The Wisconsin court's decision to distinguish *Edgerton* rather than overrule it, was one the court later came to regret. In *Johnson Controls*, Justice Crooks, the author of *Hills*, separately concurred in the majority opinion to lament the court's failure to previously overrule *Edgerton*, given the opportunity it had to do so in *Hills*. *Johnson Controls Inc. v. Employers Ins. Co. of Wausau*, 665 N.W.2d 257, 297 (Wis. 2003) ("In retrospect, it seems quite clear that we should have overruled, not distinguished, *Edgerton* six years ago."). (App. 62a).

consequence of these decisions, at least as they began to be construed by the lower courts of appeals, was that an insured's right to insurance coverage depended on variables that were not in the policy and seemingly made little sense, such as the identity of the claimant as a government or non-governmental party, the stage of the underlying proceedings, and whether the insured had been joined in an actual lawsuit. *See, e.g., Amcast Indus. Corp. v. Affiliated FM Ins. Co.*, 584 N.W.2d 218 (Wis. Ct. App. 1998).

C. The Wisconsin Court of Appeals' Treatment of Johnson Controls Under the *Edgerton/Hills* Framework

In 1998, the Wisconsin Court of Appeals issued a decision that attempted to reconcile *Edgerton* and *Hills* as they applied to this case. The court of appeals created a generic matrix of site "categories" and remanded the case to the trial court to apply its analysis to the 21 sites at issue. The categories were:

Category 1. "[A]n insured who is responsible for the contamination cleans up the site pursuant to a directive issued by a government under [CERCLA] ... or its state counterparts."

Category 2. "[A]n insured is responsible for at least part of the contamination of a site that it does not own, but has not been directed by a government to remediate the site. A governmental agency has, however, directed others responsible for the contamination ... to clean it up, and they sue the insured to recover the clean up costs attributed to the insured."

Categories 3 and 4. "[T]he insured is responsible for at least part of the contamination of a site that it does not own, and *has* been directed by a government to remediate the site but has not done so. The insured is sued either by the government to recover money it spent to clean up the site [Category 3], or by

the site's owner or others also responsible for the contamination who cleaned up the site at the government's direction [Category 4]."

(App. 98a-100a).

The Wisconsin Court of Appeals found that sites falling into Categories 1, 3 or 4 did not trigger coverage under CGL policies covering "damages", while Category 2 sites did trigger coverage.[2] The court of appeals remanded this case to the trial court for fact-finding and entry of a "global judgment". (App. 103a-104a).

On remand, Johnson Controls supplied a factual record addressing the four categories. Despite this record, the trial court found that none of the 21 sites were covered. As part of its decision, the trial court noted that coverage was precluded at sites involving a PRP letter because "there is no active 'suit' or 'suit for damages' as defined by *Edgerton*." (App. 127a; *see also* App. 129a, 133a, 134a, 137a, 138a, 140a).

Johnson Controls appealed the trial court's ruling as to application of the categories, but also reserved the right to appeal to the Wisconsin Supreme Court the continuing validity of *Edgerton*. The court of appeals affirmed, though in doing so it noted the "arbitrary" distinctions that *Edgerton* had produced,

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[2] The analysis of categories 3 and 4 relied upon reasoning in a case from the Seventh Circuit Court of Appeals, *Wisconsin Power & Light Co. v. Century Indemnity Co.*, 130 F.3d 787 (7th Cir. 1997), in which an insured who had not complied with an administrative order was compared to a life insurance beneficiary who murders his or her spouse. Based upon this analogy, the Wisconsin Court of Appeals held that an insured should not be able to "transmute" a non-covered claim into a covered one through "intentional wrongdoing" — by disregarding a clean-up "directive" that came before a "suit" that would have triggered a defense and coverage. *Id.*

while nonetheless acknowledging that it had no choice but to apply those distinctions, since "this is the law set by our supreme court and we are obligated to apply this law." (App. 88a).

D. Proceedings Before the Wisconsin Supreme Court

In January 2002, Johnson Controls petitioned the Wisconsin Supreme Court for review of the court of appeals decision. In its Petition to the Wisconsin court, Johnson Controls sought review of the following question (among others):

> Should *City of Edgerton v. General Casualty Co.*, 184 Wis.2d 750, 517 N.W.2d 463 (1994) be overruled in light of the "arbitrary" and "debatable" distinctions it has produced and the discrediting of authorities upon which it relied?

(App. 149a-150a).

The Wisconsin Supreme Court accepted the case without limitation on the issues presented. In the brief it subsequently filed with that court, Johnson Controls argued that insurance coverage for environmental liability should not depend on the existence of an actual lawsuit, the stage of the underlying claim at the time of any clean-up or settlement for which coverage was sought, or the identity of the claimant as a government or non-government party.

The insurers, including Wausau, sought an extension of time from the Wisconsin Supreme Court to file response briefs. (R-App. A-1). The insurers informed the court that an extension was needed to "permit Wausau and the dozens of other Defendants-Respondents the necessary time to coordinate

their briefing efforts. . ." (R-App. A-1). The court granted the requested extension and the insurers did indeed seem to have allocated briefing responsibility. Two principal briefs—submitted by counsel for each of the "primary" insurers on the case, Travelers and Wausau—were filed, with joinders filed by the many excess insurers in the case.

Both respondent briefs expressly argued the reasons why pre-suit liability should not be covered. Contrary to Petitioner's suggestion in its Petition to this Court, the "PRP letter as suit" issue was expressly briefed. Travelers' brief provided a detailed argument that a PRP letter was not a "suit" in a section of its brief titled: "A PRP Letter Or The State Agency Equivalent Is Not A Suit". (R-App. B-1).

Also contrary to Wausau's suggestion in its Petition to this Court, the "suit" issue was expressly argued before the Wisconsin Supreme Court. At oral argument, counsel for Johnson Controls reiterated the point made in its briefs that coverage for environmental liability should not depend upon the existence of a lawsuit. Moreover, counsel expressly noted that the Court should reconsider its original ruling in *Edgerton* that a PRP letter was not a "suit":

> We had a PRP letter. And a PRP letter is the start of something adversarial and coercive and extremely dangerous and extremely costly. I commend the Utah case to you, Quaker State, in which the full panoply of harsh things that can happen to somebody who ignores a PRP is set out some detail. The Indiana case, Travelers Indemnity, who said, you know, the other half of the CGL policy says, and I just want to read it, it says, "the company shall have the right and duty to defend any suit against the insured seeking damages account of such property damages." That's separate

> from the duty to indemnify, I mean that's separate from the duty to pay all sums legally obligated. In this case you don't even have to get to the duty to defend in my judgment because we put our insureds on notice and they abandoned and therefore we did what we had to do. But there's a respectable body of law around the country which we cited to this Court that increasingly has been speaking with one voice that says that the word suit is ambiguous. Justice Abrahamson in dissent, I believe, in *Edgerton* made that point and I think that point's made by a lot of other judges.

Oral Argument, available at www.wicourts.gov/ra/011193.ram

Counsel for Travelers responded to this portion of Johnson Controls' oral argument on the "suit" issue:

> In urging the Court to overrule the *Edgerton* decision, Johnson Controls is asking the Court to take contract terms that it has previously found to have clear and unambiguous meanings, namely suit and damages, and could now hold these terms mean something completely different than the Court previously said they meant.... The key dispositive issue before the Court of Appeals and the precedents of this Court, which the Court of Appeals faithfully applied, is what do the terms "suit" and "damages" mean in the context of the CGL policy. This Court has found that suit means a lawsuit filed in a Court of law and damages does not include response costs under CERCLA or similar state regulatory statutes. It is difficult to imagine anything that would be more contrary to the principles of *stare decisis* than Johnson Controls' request that this Court now announce that these terms again mean something completely different. *Id.*

On July 11, 2003, the Wisconsin Supreme Court issued a decision reversing the court below. (App. 1a – 63a) In its decision, the Wisconsin Supreme Court found that the mere stage of proceedings of an underlying claim could have no logical bearing on whether that claim was covered by insurance. An insurer's duty to indemnify was triggered once the insured was required to spend money for a clean-up. Consistent with this ruling the Wisconsin court went on to observe that an insurer's duty to defend was triggered because, given the practical realities of CERCLA proceedings, a PRP letter should be considered a "suit" for insurance purposes. (App. 34a – 41a). In short, the court overruled *Edgerton* in its entirety.

Following the Wisconsin court's decision, the insurers filed motions for reconsideration. Amicus briefs were also filed and accepted by the court. Among the issues extensively briefed in Wausau's motion was that the court should reconsider its holding that a PRP letter was a "suit." (R-App. C-5-12). The motion for reconsideration was denied.

REASONS FOR DENYING THE PETITION

A. This Is Not an Appropriate Case For the Court to Consider Whether *Sua Sponte* Decision-Making by an Appellate Court Constitutes a Due Process Violation

Petitioner asks this Court to establish a rule that appellate courts should be prohibited, as a matter of constitutional law, from ruling on a point of state law unless that point is presented to the appellate court for review and briefed and argued by the parties, and the parties have a full opportunity to be heard on the point. As a preliminary matter, whatever the merits of such a rule, this is not an appropriate case for its consideration. The question of whether a PRP letter is a "suit" was presented to the Wisconsin court for review, it

was briefed, it was argued, and the parties had ample opportunity to be heard on it. If this Court grants the Petition, it would likely never reach the issue for which review is sought.

Johnson Controls' petition for review to the Wisconsin Supreme Court expressly asked, among other things, whether *Edgerton* should be "overruled." (App. 149a-150a). This statement of the issue sufficiently raised the continued validity of that case, including that portion addressing whether a PRP letter constitutes a "suit" under a standard CGL insurance policy.[3]

In its opening brief, Johnson Controls argued at length that an insurer's duties arise prior to the filing of an actual lawsuit. The reasoning in support of this argument applies with equal force to the specific question of whether a PRP letter is a "suit" for insurance purposes.[4]

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[3] The Supreme Court of Wisconsin interprets its appellate rules to permit consideration of "arguments" not addressed by the parties, as long as they are fairly contained within the "issue" presented for review. *State v. Weber*, 476 N.W.2d 867, 868 (Wis. 1991) (holding that a statement of the issue permits consideration of all supporting arguments, even if the supporting argument is not addressed by parties). This Court's Rule 14.1(a) addresses the same scenario. Under Rule 14.1(a), this Court may consider arguments not addressed by the parties if they are "fairly included" within the question presented in the petition. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995) (considering an argument fairly included in the petition although not argued by the parties). Under Johnson Controls' broad statement of the issue of whether *Edgerton* should be overruled, the court could properly consider all aspects of *Edgerton*, including the "PRP letter as suit" portion of that case, even in the absence of argument by the parties. Although this avenue is available to appellate courts, the Supreme Court of Wisconsin did not need to rely on this rule of decision-making because the "suit" argument was actually briefed and argued by the parties.

[4] The degree to which these issues are intertwined is demonstrated by a decision by the California Supreme Court, *Certain Underwriters at Lloyd's of London v. Superior Court ("Powerine")*, 16 P.3d 94 (Cal. 2001), where the

That these arguments are related is evidenced by the insurers' coordinated response briefs, which expressly addressed the specific question of what is a "suit." Petitioner's co-defendant, Travelers, devoted an entire section of its brief to the "suit" argument. In a section of its brief entitled "A PRP Letter Or The State Agency Equivalent Is Not A Suit", Travelers argued at some length that Johnson Controls had "merely received PRP letters, similar letters or notices requesting remediation" and that this correspondence did not constitute a "suit" under Wisconsin law. (R-App. B-1).

Contrary to what is claimed in the Petition, the question of what is a "suit" was also addressed at oral argument. As demonstrated by excerpts from oral argument, quoted in the Statement of the Case above, counsel for both Johnson Controls and Travelers expressly argued the point. Citing specific case law, counsel for Johnson Controls argued that the coercive and costly nature of a PRP letter triggers an adversarial process. Counsel for Johnson Controls also suggested that a substantial body of case law has found the word "suit" in a CGL policy ambiguous. Counsel for the insurers responded to this argument by noting that the definition of the terms "suit" and "damages" was the "key dispositive issue" before the Supreme Court of Wisconsin.[5] Counsel went on to note that "this Court

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California Supreme Court had found that there was no duty to indemnify for "damages" unless and until there was a duty to defend, which was not triggered until there was a "suit", and that since a PRP letter was not a "suit" an insured receiving such a letter had no coverage. The insurers argued the *Powerine* rationale to the Wisconsin Supreme Court, which expressly rejected it. (App. 47a).

[5] As with briefing, the dozens of insurers in this case delegated their argument to two attorneys, one representing Wausau and the other Travelers. Counsel for Travelers made the oral argument regarding "suit."

[the Wisconsin Supreme Court] has found that suit means a lawsuit filed in court."

Finally, on reconsideration Wausau (and the other insurers) had the opportunity to make, and did make, all of the same arguments Wausau now says it was deprived from making on the "suit" issue. There is nothing to suggest that the Wisconsin court refused to reconsider the case for any reason other than that it did not find those arguments persuasive.[6]

The issue presented to the Wisconsin Supreme Court provided notice and opportunity to argue the meaning of the term "suit," and that argument was, in fact, made. There is no basis in the record to suggest otherwise. The facts of this case do not provide a meaningful opportunity for this Court to clarify whether *sua sponte* statements of law by appellate courts are constitutionally prohibited as violations of due process.

It is thus no answer in this case to suggest, as Wausau does, that at "some point" there exists an imaginary, ill-defined

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[6] Wausau is simply wrong in claiming that the Wisconsin Supreme Court may deny such a motion "for any reason, or, as in this case, for no reason at all." Pet'n at 19. The Wisconsin Supreme Court's procedures on reconsideration are set forth in that Court's internal operating procedures which provide that reconsideration "*will* ensue only when the court has overlooked controlling legal precedent or important policy considerations or has overlooked or misconstrued a controlling or significant fact appearing in the record." Wis. S. Ct. IOP 2 J (emphasis added). There is no basis to suggest or conclude that the Wisconsin Supreme Court does not follow these procedures. Indeed, as recounted by the Wisconsin Supreme Court in *Johnson Controls* (App. 8a), the principal case on which *Edgerton* had relied was *School Dist. of Shorewood v. Wausau Ins. Cos.*, 488 N.W.2d 82 (Wis. 1992). That case had originally been decided in favor of the insured. *School Dist. of Shorewood v. Wausau Ins. Cos.*, 484 N.W.2d 314 (Wis. 1992). Upon the insurer's motion for reconsideration, the Wisconsin Supreme Court withdrew its original decision and issued a decision in favor of the insurer, without further briefing or re-argument.

line that appellate courts cannot constitutionally cross in this area. Wherever such a line may exist, it was not crossed in this case. Indeed, it is telling that Wausau also acknowledges that appellate courts can "undoubtedly" in some situations examine issues *sua sponte*, but says little about what those circumstances are. Pet'n p. 3. Is it where there is no mention of the issue at any stage of appellate court proceedings? Wausau would fail to meet such a test, given what was briefed and in the oral argument transcript. Is it where there is no state law procedure allowing the point to be addressed at reconsideration? Wausau would fail here too, since Wausau was afforded every right to, and did, challenge the court's "suit" ruling on reconsideration under Wis. Stat. § 809.64. At bottom, Wausau is left only with its complaint — the real reason it has come to this Court — that this decision "might" cost it "tens of millions of dollars" due to its effect in other cases. But the fact is, the insurer defendants had the opportunity to argue the issue, they did argue the issue and the Wisconsin Supreme Court ruled against them. Whatever this Court's views may be on *sua sponte* decision-making, there is no reason for this Court to take review in this case.[7]

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[7] The complexity of the factual record, together with its underlying legal framework, would also suggest that this is not the right case, from a resource allocation standpoint, for examination of the due process issue set forth in the Petition. In order to determine whether any due process violation is so egregious that it outweighs Wisconsin's strong interest in developing its law, this Court would need to gain an understanding of a 15 year old case record, involving 21 Superfund sites, activities spanning over 40 years, and 30 plus insurers, involving years of discovery and two trips to the Wisconsin court of appeals against the backdrop of a ten year on-going legal controversy in Wisconsin over the *Edgerton* decision. The Court would be required to determine whether or not the issue of an insurer's pre-suit obligations—which was a primary focus of the parties' briefing—would fairly encompass a ruling that a pre-lawsuit PRP letter should constitute a "suit" for insurance purposes, particularly where the specific "PRP letter as suit" point was expressly addressed in the insurers' coordinated briefing effort and by both

B. The Constitution Does Not Prohibit Appellate Courts from Declaring the Law *Sua Sponte*

The rule proposed by Wausau—that there should be a constitutional bar on an appellate court ruling on a point of state law unless it is fully presented to the court for review through the written briefs of the parties prior to a motion for reconsideration—is not a rule that this Court need, or should, consider adopting at this time. Indeed, such a rule would deprive appellate courts of needed flexibility in carrying out their law-making function, and would fly in the face of decades of judicial practice, including within this Court, where important points of law have, in the Court's discretion, long been crafted without the full, or even any, development of those points in the parties' briefs or arguments.

While we are not aware of any recent trend of the type claimed by Wausau in which this discretion has been expanded, we are aware that appellate courts—including this Court—have long felt unconstrained to announce new rules of law without briefing, where deemed necessary to the orderly and proper development of the law. No less a rule of law than the Erie Doctrine was decided without the issue having been raised by the parties. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *accord Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) (*sua sponte* consideration of whether to impute liability for punitive damages under agency principles); *United States v. International Bus. Machines Corp.*, 517 U.S. 843 (1996) (*sua*

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sides at oral argument. This Court would then need to delve into the underlying policies concerning Wisconsin law, and the extent to which the Wisconsin Supreme Court's lawmaking function in this particular case outweighs any potential concerns of the individual litigants concerning notice and an opportunity to be heard.

sponte decision that federal statute is unconstitutional); *Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1991) (*sua sponte* consideration of issue "antecedent to" the dispute); *Teague v. Lane*, 489 U.S. 288 (1989) (*sua sponte* consideration of rules governing habeas review); *Batson v. Kentucky*, 476 U.S. 79 (1986) (*sua sponte* consideration of peremptory challenge framework); *Michelin Tire Corp. v. W.L. Wages*, 423 U.S. 276 (1976) (*sua sponte* consideration of whether state statute is unconstitutional); *Mapp v. Ohio*, 367 U.S. 643 (1961) (*sua sponte* decision that exclusionary rule barring illegally obtained evidence applies to the states through the Fifth and Fourteenth Amendments); *Boynton v. Virginia*, 364 U.S. 454 (1960) (*sua sponte* consideration of issues to avoid reaching constitutional question).

The most vocal criticisms of *sua sponte* decisions are typically found in dissenting opinions. It is notable that, while dissenting opinions in the cases cited above criticized the *sua sponte* decisions of the majority as ill advised, none suggested the decisions were a violation of due process. *See Kolstad*, 527 U.S. at 553 (Stevens, J., dissenting); *International Bus. Machines Corp.*, 517 U.S. at 863 (Kennedy, J., dissenting); *Batson*, 476 U.S. at 112 (Burger, C.J., dissenting); *Teague*, 489 U.S. at 330-31 (Brennan, J., dissenting). These dissenting opinions confirm the absence of any constitutional mandate prohibiting *sua sponte* decisions by appellate courts. Justice Scalia has confirmed this point: "[T]he refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary." *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., dissenting). In the absence of a constitutional question, this Court has no reason, or jurisdiction, to grant the Petition.

Even if the Due Process Clause were implicated by *sua sponte* decisions of state courts declaring state law, there would be no violation in this case. Due process is, as Wausau acknowledges, a flexible concept. A due process analysis involves the threefold balancing of the private interests affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, and the governmental interest at stake. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *City of Los Angeles v. David*, 123 S. Ct. 1895, 1896 (2003).

When it comes to weighing these interests in the area of an appellate court's law-making function, the governmental interest at stake has always been considered paramount. It is not a "due process" violation when a court makes new law, simply because some party who will be adversely affected by the discharge of that function, claims not to have had an opportunity to completely "brief" the issue. Indeed, by that rationale, appellate courts, and legislatures for that matter, would deprive parties of due process every day, for the law is constantly evolving in ways that may have an adverse impact on countless parties, sometimes severely so, without providing any meaningful input or right to be heard on the issue. This Court long ago held that such process is not required:

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex

> society, by their power, immediate or remote, over those who make the rule.

Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915). While this Court's decision in *Bi-Metallic* was applied to administrative action, the reasoning applies with equal force to appellate courts in the exercise of their law-making function. Judges of state courts of last resort have the inherent power to declare the common law of the state.[8]

In this regard, Wausau's reliance on what it characterizes as the "similar" case of *Brinkerhoff–Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) is misplaced. In *Brinkerhoff*, the Missouri Supreme Court had imposed a newly created procedural "exhaustion" requirement on the petitioner's claim that certain tax levies were being assessed in a discriminatory manner, then found that the administrative remedy that had to be exhausted was unavailable due to the petitioner's delay in seeking it. The problem was not that the lower court had imposed the requirement *sua sponte*, but that the new requirement in essence acted as an *ex post facto* procedural bar. Indeed, in the course of its opinion, this Court made it plain that this was the "due process" violation, when it stated that "if the administrative remedy were still available to the plaintiff, there would be no denial of due process . . ." *Id.* at 455 n.9. Of course, to the extent the case could somehow be

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[8] For at least that reason, this case does not present "a similar action" to that in *Turn-Key-Tech LLC v. National Film Laboratory Inc.*, No. 03-1138 (pet'n for cert. filed February 3, 2004). Pet'n at 3, 28. The case at bar involves a statement of a rule of law by the highest court of a state, whereas *Turn-Key-Tech* involves the Federal Circuit's *sua sponte* modification of a district court's ruling on the facts in an infringement lawsuit. In *Turn-Key-Tech*, the Federal Circuit dismissed the district court's patent claim construction in favor of its own *sua sponte* construction. *Turn-Key-Tech, LLC v. National Film Lab. Inc.*, 2003 WL 22097823 at *2 (Fed. Cir. Oct. 6, 2003).

construed as condemning *sua sponte* appellate decision-making as a "due process" violation, it would have been implicitly overruled by the intervening decades of Supreme Court precedent described above.

Finally, even if *sua sponte* decisions in some cases could implicate the Due Process Clause, there exists no violation in this case because Wausau does not assert an adequate interest in "property" under the Fourteenth Amendment. In that regard, it is important to note that Wausau is not seeking *certiorari* review in order to escape the effects of any money judgment or other specific court action that could even potentially amount to a taking of a property interest without an opportunity to be heard. The Wisconsin Supreme Court did nothing more than declare the law and remand the case back to the trial court for further proceedings. Those proceedings will likely include trial or summary judgment on numerous contested issues, and perhaps even further proceedings in the Wisconsin appellate court system, before there is any final judgment in this case.

Thus, assuming *arguendo* that the issue of *Edgerton's* continuing validity had not been raised in Johnson Controls' petition to the Wisconsin court, assuming that the coordinated briefing effort of the insurers had not raised it, assuming that it was not raised at oral argument and assuming there was no reconsideration process available to raise it, there still would be no due process violation here. That the Wisconsin Supreme Court, in the process of overturning a bad case precedent that presented a threshold bar to a claim for insurance coverage, also took the occasion to re-examine a closely related subsidiary issue that would likely come to the fore on remand and in other cases, is hardly remarkable or unprecedented, and nothing more than an exercise of that court's institutional power to declare the

law and provide guidance to the parties and litigants in other cases. Such an exercise presents no due process claim.

Due process is not required unless a party is being deprived of an interest in "property" within the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). This Court, in *Roth,* noted that while it "has eschewed rigid or formalistic limitations on the protection of due process, it has at the same time observed certain boundaries." *Id.* at 572. These boundaries require that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

Applying this definition of "property" to this case, Wausau must show that it has a "legitimate claim of entitlement" to a particular interpretation of the word "suit" by the Wisconsin Supreme Court. It is a showing Wausau cannot possibly make. A party simply does not have a legitimate entitlement to have an appellate court declare the law in any particular manner, even when overruling a prior decision:

> There is no vested right in the decisions of a court and a change of decision does not deprive one of equal protection of the laws or property without due process of law. Even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process of law under the Fourteenth Amendment.

Baumann v. Smrha, 145 F. Supp. 617, 625 (D. Kan. 1956) (*citing O'Neil v. Northern Colorado Irrigation Co.*, 242 U.S. 20, 26-27 (1916)); *accord Sunray Oil Co. v. Commissioner of*

Internal Revenue, 147 F.2d 962, 963-64 (10th Cir. 1945); *Ward v. Harding*, 860 S.W.2d 280, 288 (Ky. 1993); *D.J.L. v. Armour Pharm. Co.*, 704 A.2d 104, 115 (N.J. Super. Ct. Law Div. 1997). Wausau has no property interest in the Wisconsin Supreme Court's interpretation of "suit" and pronouncement of state common law. Therefore, under no circumstances could there be a due process violation, even if the issue had not been briefed or argued by the parties prior to the Wisconsin Supreme Court's decision and on reconsideration.

CONCLUSION

For the foregoing reasons, Johnson Controls respectfully requests that the Petition be denied.

Respectfully submitted,

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APPENDIX A

SUPREME COURT
OF WISCONSIN

* * * *

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE RESPONDENT'S BRIEFS

Defendant-Respondent Employers Insurance of Wausau A Mutual Company ("Wausau") respectfully moves this Court for an Order, pursuant to Sections 809.14 and 809.82(2) of the Wisconsin Statutes, granting Wausau and the other Defendant-Respondents a short extension of time to file Respondent's Briefs up to and including July 2, 2002. Presently, Wausau's Respondent's Brief and the Respondent's Briefs of all of the other Defendant-Respondents are currently due on June 11, 2002.

Good cause exists for granting Wausau and the other Defendant-Respondents this short extension of time to respond to Plaintiff-Appellant Johnson Controls, Inc.'s ("JCI") Brief and Appendix. The requested three-week extension will permit Wausau and the dozens of other Defendant-Respondents the [3]necessary time to coordinate their briefing efforts and thereby minimize the number and volume of Respondents' Briefs filed with the Court.

The Court of Appeals affirmed the Circuit Court's grant of summary judgment to Wausau and the other Defendant-Respondents on December 27, 2001. JCI filed a Petition for Review, which was accepted by this Court pursuant to the Order, dated April 22, 2002, in which JCI raised a number of issues concerning the Court of Appeals ruling and expressly requested that this Court overturn existing Supreme Court case law.

This Court's Order provided that JCI's Brief was due thirty days thereafter, or May 22, 2002. The Order also directed that defendants-respondents' briefs be filed 20 days thereafter, or June 11, 2002.

This appeal stems from an insurance coverage dispute in which JCI seeks coverage for costs that it allegedly incurred in connection with alleged environmental liabilities arising from environmental contamination at 21 sites throughout the United States. In addition to Wausau, more than two dozen other insurance companies also are Defendants-Respondents in this appeal. In light of the significance of the issues and the relief requested by JCI, each of the Defendants-Respondents has a heightened interest in the briefing of this appeal.

In any multi-party appeal, preparation of Respondents' Briefs that may be joined in by numerous Defendants-Respondents necessarily requires additional time beyond what is typically required to prepare a Respondent's Brief in an [4]appeal in which there is only one or two Respondents. The additional coordination time is necessary to allow each Respondent the opportunity to review, comment upon, revise and approve the brief. Drafts of briefs must be exchanged, reviewed, revised and approved by each Defendant-Respondent. This procedure is particularly exacerbated because of the large number of Defendant-Respondents in this case.

In addition, the final drafts of any Defendant-Respondent Briefs likely will be subject to approval by one or more of the Defendant-Respondents' internal legal staff. This requires even more additional time and coordination before one or more Defendant-Respondent Briefs may be approved by all joining parties and filed with the Court.

If granted this extension will allow Wausau and the more than two dozen other Defendant-Respondents a total of 51 days to prepare and file Defendant-Respondent Briefs. In light of the above, this is a

reasonable time period for Wausau and the Defendant-Respondents to coordinate and minimize the number of Respondent's Briefs. These efforts will simplify and decrease the burden on this Court because, as a result, a limited number of Defendant-Respondents' Briefs will be filed as opposed to the possibility of dozens of such briefs being filed if this extension is not granted.

[5]Therefore, based upon the foregoing, Wausau respectfully requests that the Court grant an extension of time, up to and including July 2, 2002, for Wausau and the other Defendant-Respondents to file their Respondent's Briefs.

* * * *

APPENDIX B

SUPREME COURT
OF WISCONSIN

* * * *

BRIEF AND APPENDIX OF THE TRAVELERS INDEMNITY COMPANY

* * * * [32] * * * *

(b) A PRP Letter Or The State Agency Equivalent Is Not A Suit.

Under the plain language of the CGL policies, an insurer's "duty to defend" is not triggered unless and until a "suit" has been filed. With respect to many of the sites for which JCI seeks coverage[10], no lawsuit has been filed at all. Instead, JCI merely received PRP letters, similar state letters or notices requesting remediation. These letters and notices are not "suits," as that term has been defined under [33]Wisconsin law, and thus do not give rise to any defense obligations on the part of the insurers.

The policy term "suit" has a plain and unambiguous meaning under Wisconsin law. A "suit" is: "any proceeding by one person or persons against another or others *in a court of law* in which the plaintiff pursues, *in such court*, the remedy which the law affords him, for the redress of an injury or the enforcement of a right, whether at law or equity." *State v. P.G. Miron Const. Co., Inc.*, 181 Wis. 2d 1045, 1053, 512 N.W.2d 499, 503 (1994). Thus, as this Court held in *Edgerton*: "the primary attribute of a "suit" is that parties to an action *are involved in actual court proceedings, initiated by the filing of a*

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10 With respect to Travelers policies, no response costs suits have been filed in connection with the Lakeland, Goshen and Compton Sites. (T-Ap. 003, 065-067, 069-070)

complaint." 184 Wis. 2d at 775 (emphasis added). *See also Accounting Data, Inc. v. McMurtrie*, 78 Wis. 2d 89, 92, 253 N.W.2d 534, 535 (1977)(the term suit "applies to any proceeding in a court of justice by which a party pursues the remedy which the law affords for litigating a subject of controversy between adverse parties")(quoting *Milwaukee L. H. & T. Co. v. Ela Co.*, 142 Wis. 424, 428, 125 N.W. 903, 905 (1910).

[34]Under this definition, a PRP letter or administrative notice is not a suit. It is not a proceeding in a court in which the plaintiff pursues a remedy. Indeed, the *Edgerton* Court rejected the mere suggestion that PRP letters were the "functional equivalent" of a suit. 184 Wis. 2d at 776 (quoting *Ryan v. Royal Ins. Co. of Am.*, 916 F.2d 731, 741 (1st Cir. 1990)). Such a status would not be good enough; as this Court noted in *Edgerton*, "[either] there is a suit or there is not." 184 Wis. 2d at 781.

For these reasons, the Court should reaffirm its holding in *Edgerton* that the PRP letters and their state equivalent do not constitute "suits" for purposes of the CGL policies.

* * * *

APPENDIX C

SUPREME COURT
OF WISCONSIN

* * * *

DEFENDANT-RESPONDENT EMPLOYERS INSURANCE OF WAUSAU'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

* * * *

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III. THE COURT SHOULD RECONSIDER ITS DECISION ON THE "SUIT" ISSUE BECAUSE IT OVERLOOKS *STARE DECISIS*, INSURANCE CONTRACT CONSTRUCTION PRINCIPLES, AND PUBLIC POLICY CONSIDERATIONS.

A. The Decision Overlooks The Application of *Stare Decisis* To *Edgerton's* Holding On The "Suit" Issue.

The decision is extraordinary as well because it overturns established Wisconsin law on the "suit" issue with no explanation of why departure from *stare decisis* was appropriate.

In the context of the "damages" issue, the decision explained the importance of *stare decisis* and the standard by which the court may, in extremely rare circumstances, depart from it. ¶¶ 94-95, 98-99. Despite these statements of the doctrine's importance and the rigorous standards that must be met to overcome it, there is no mention of how the standard is satisfied on the "suit" issue. *See* ¶¶ *93-119.* The *only* explanation for overturning *Edgerton* on the meaning of "suit" is a passing mention that "[t]he *Edgerton* court's definition **[15]**of "suit" *gives us pause.*" ¶ 76 (emphasis added). At best, however, that explains only that the present composition of the Court now disagrees with *Edgerton's* holding that a PRP letter is not a "suit." *See* ¶¶ 77-92; ¶ 135 (Wilcox, J., dissenting). Such an explanation is insufficient, as the Court itself acknowledged in the context of the "damages" issue. ¶ 33.

The Court now has made two diametrically opposed statements concerning an insured's "reasonable expectations" in connection with the "suit" issue. *Edgerton* held that:

> *[T]he word "suit" is easily understood and unambiguous to a reasonable policyholder.* The proof

> is in the decisions that hold that a "PRP letter" is the "functional equivalent of a suit." Either there is a suit or there is not. When there is no suit, there is no duty to defend.

184 Wis. 2d at 781 (emphasis added). In this case, the Court found that an insured would have "reasonable expectations" directly contrary to the holding in *Edgerton: "[a] reasonable person in the position of the insured would expect the insured* (sic) *to provide a defense*" in the context of a PRP letter." ¶ 85 (emphasis in original).

1. The Court's decision overlooks the absence of any changes or developments in the law on whether a PRP letter is a "suit."

There have been no developments or changes in the law of Wisconsin that would justify a reversal of *Edgerton*'s "suit" holding. Numerous well-respected courts have cited *Edgerton's* holding on the "suit" issue and relied upon its **[16]**rationale in reaching the same conclusion. *See, e.g., Foster Gardner Inc. v. Nat'l Union Fire Ins. Corp.*, 959 P.2d 265, 281-82 (Cal. 1998); *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 655 N.E.2d 842, 847 (Ill. 1995).[8] Many other courts have reached the same result.[9]

2. There are no newly ascertained facts that would require a result different from *Edgerton.*

The dissent correctly observes that "[t]his case does not present us with a wholly new set of facts." ¶ 135. The Court's decision fails to identify a single new fact since *Edgerton* that would justify overturning its "suit" holding.

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[8] *See also CIM Ins. Corp. v. Masamitsu,* 74 F. Supp.2d 975, 986 (D. Ha. 1999); *Fireman's Fund Ins. Co. v. Superior Court,* 78 Cal. Rptr.2d 418, 420 (Cal. App. 2d Dist. 1999).

[9] *See* Barry R.Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 10.04[c][2](11th Ed. 2002), and cases cited therein.

In fact, although the parties never briefed the "suit" issue, JCI"s brief actually demonstrates the correctness of *Edgerton's* holding and the inaccuracy of this Court's assumptions concerning an insured's reasonable expectations. In arguing on the "damages" issue, JCI's brief contrasted PRP letters with other forms of government action and explained that a recipient of a PRP letter is "not legally obligated to take any action." JCI's Brief at 7. JCI's brief further states "Parties receiving this type of preliminary correspondence. . . are not legally [17]obligated to take any action." *Id.* JCI's admission is contrary to the Court's conclusions as to an insured's "reasonable expectations."

3. There has been no showing that *Edgerton's* "suit" decision has become detrimental to coherence and consistency in the law.

Edgerton premised its holding on a plain and unambiguous interpretation of the word "suit," which has the same meaning in other areas of Wisconsin law as it does in the context of insurance law. 184 Wis. 2d at 744 (citing *State v. P.G. Miron Constr. Co., Inc.*, 181 Wis. 2d 1045, 1053 512 N.W.2d 499 (1994)). No Wisconsin decision since *Edgerton* has ever suggested that the "suit" rule has been a problem to apply or is in any way inconsistent with Wisconsin law.

B. The Court's Decision Violates Long-Established Wisconsin Insurance Construction Principles.

Not only does the Court's decision violate principles of *stare decisis* with respect to the "suit" issue, it also derogates well-settled principles of insurance policy construction. It has long been the law of Wisconsin that, where a provision in an insurance policy is unambiguous on its face, courts should not engage in construction of the unambiguous term. As the Court stated 25 years ago in *Mercardo v. Mitchell,* 83 Wis. 2d 17, 25, 264 N.W.2d 532 (1978):

> When no ambiguity exists, it is equally clear the court cannot construe the policy. . . to include insurance coverage that was not agreed to by the parties and for which no premium was assessed or paid. To do so would be to re-write the contract of the parties – a power the court does not have.

[18]The Court confirmed these and other fundamental principles in *Folkman*, just days after this decision. Not only did *Folkman* confirm that "the first issue in construing an insurance policy is to determine whether an ambiguity exists," but it also cited with approval other recent holdings of the court confirming that an insured may not reasonably expect coverage contrary to plain and ambiguous policy language. *Folkman*, 2003 WI 116, ¶ 13. Thus, *Folkman* quoted from *Taylor v. Greatway Ins. Co.*, 2001 WI 93, ¶ 26, 245 Wis. 2d 134, 628 N.W.2d 916, as follows:

> Because the definition of underinsured vehicle in each of American Family's policies is unambiguous standing on its own *and in the context of the whole policy*, **we do not need to engage in construction to determine Taylor's reasonable expectations.**

Folkman, 2003 WI 116, ¶ 25 (italicized emphasis in original, bold emphasis added).

In a radical departure from these long-standing rules, the Court's decision in this case suggests an entirely different analysis. Without first finding any ambiguity in the "suit" language or even addressing the fact that it had previously held the term "suit" to be plain and ambiguous in various contexts, the Court, instead, interpreted the terms according to its own conclusions of what JCI would have "reasonably expected." The Court's actions clearly violated Wisconsin law, as stated in *Folkman*, that a policyholder may not have "reasonable expectations" of coverage that are contrary to plain and unambiguous policy language.

[19]The Court's conclusion as to the insured's "reasonable expectations" was based on the Court's analysis of a "PRP letter"[10] and several separate policy provisions relating to notice of an "occurrence," notice of a claim or suit, cooperation by the insured, voluntary payments, the duty to defend and the duty to indemnify. *See* ¶¶ 77-85. However, the Court's conclusion is premised on misstatements of Wisconsin law on several issues, disregards critical language from the Wausau policies, and is contrary to the evidence of JCI's actual expectations. ¶¶ 84-85. Notably, in incorrectly concluding that an insurer's duty to defend is co-extensive with an insured's duty to give notice and cooperate, the Court ignores critical language in the insuring agreement that provides:

> [T]he company . . . may make such investigation and settlement *of any claim or suit* as it deems expedient.
> . .

Edgerton, 184 Wis. 2d at 750 (emphasis added). Only by overlooking this language, could the Court mistakenly conclude that the insurer's duty to defend "suits" must be interpreted broadly to mirror the insured's obligation to provide notice of an "occurrence, claim or suit." However, the foregoing policy language demonstrates that the insured must give notice not only of "suits" so that the insurer may defend, if necessary, but also of any "occurrence, claim or suit" **[20]**so that the insurer can exercise its right to investigate and settle "claims." Moreover, by interpreting the term "suit" to include non-lawsuit "claims," the decision violates the fundamental principle of insurance contract construction that all terms must be given meaning and not be rendered mere surplusage. *See Grotelueschen v. American Family Mut. Ins. Co.*, 171 Wis. 2d 437, 451, 492 N.W.2d 131 (1992).

Finally, not only is the court's analysis at odds with basic principles of Wisconsin insurance law and the plain and ambiguous

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[10] As explained in the dissent, not all PRP letters are the same. ¶ 160. However, because the Court did not cite to any PRP letter in the record issued to JCI or quote from any of the language of any such PRP letter, the Court must have been referring to a hypothetical PRP letter.

policy language, but its "suit" holding also guarantees additional litigation, costs, and confusion for litigants and courts.[11] Recently, the Court has seen how just two words, "crystal clear," in the decision in *Badger Mutual Ins. Co. v. Schmitz*, 2002 WI 98, ¶ 46, 255 Wis. 2d 61, 647 N.W.2d 223, created a large and "unintended effect." *Folkman*, 2003 WI 116, ¶ 30. Those two words spawned a series of court of appeals decisions within the span of a year and "reveal[ed] that our admonition of 'crystal clarity' has been used to alter the analytical focus." *Id.*

The Court's decision in this case promises much more of the same. If permitted to stand, the decision will, no doubt, allow creative lawyers to tie up the courts for years. Moreover, by apparently allowing unsupported, purported subjective interpretations to trump unambiguous policy language, the Court's **[21]**decision suggests an unending series of Catch-22 propositions for insurance companies. Insurers will never be able to evaluate or limit the coverage they write. *Edgerton* understood this problem:

> Typically insurers assess the extent of the risks insured under policies issued. The risk of liability may then be spread among groups of insureds and premiums assigned only after the extent of the risk is determined. *The original risk assessment becomes a nullity if the language of the policy is redefined in order to expand coverage beyond what was planned for by the insurer in the contract of insurance.* Policies of insurance, premised upon a certain level of predictability and assessment of risk at the time of contracting, lose their effect without the inclusion of certain basic definitions.

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[11] The Court's attempt to minimize the fall-out from its decision by limiting its holding to "PRP letters," *see* ¶ 87 n.37, will likely have no effect in restraining arguments that the Court's decision supports a new set of interpretations for insurance policies in Wisconsin.

184 Wis. 2d at 779 n.26 (emphasis added). Contrary to the Court's suggestion, insurers and policyholders relied on *Edgerton* in connection with liability policies issued decades ago because such policies provide coverage for liabilities arising from "occurrences" during the policy period regardless of when the claim is made against the insured. Thus, these policies are just as available to be called upon to provide coverage today as they were then they were first issued.

C. The Court's Decision Overlooks Important Policy Considerations.

In addition to the problems enumerated above, the Court overlooked significant policy considerations when it reversed course on the "suit" issue. Policyholders may well assert entitlement for all past "defense costs" allegedly **[22]**incurred for PRP letters within the six years preceding the decision.[12] In fact, Wausau already has received numerous claims for defense coverage and been sued by policyholders within weeks of the decision.

Numerous lawsuits likely will be filed raising the interplay between the Court's new "suit" holding and Wisconsin's duty to defend case law. *See Mowry v. Badger State Mut Cas. Co.,* 129 Wis. 2d 496, 385 N.W.2d 171 (1986); *Newhouse v. Citizens Security Mut. Ins. Co.,* 176 Wis. 2d 824, 501 N.W.2d 1 (1993). Under *Edgerton*, there was no question when a "suit" – and, therefore, an insurer's obligations to defend – began and ended. Now, an insurer faced with a tender of defense of a PRP letter may find it impossible to satisfy its obligations under Wisconsin law and thereby risk being found to have breached its duty to defend and be estopped from asserting coverage defenses. For example, without a lawsuit, it is difficult to determine whether costs incurred by an insured are costs of defending the claim or costs of satisfying any alleged liabilities arising from the claim. In addition, an insurer may find that stays of regulatory activities

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[12] The Wisconsin Statutes provide for a six-year statute of limitations on breach of contract claims. *See sec.* 893.43, Stats; *see also* sec. 631.83(1)(d), Stats.

associated with a "PRP letter" may not be had while coverage litigation proceeds. A policyholder thus may claim the insurer should incur hundreds of thousands (if **[23]**not millions) of dollars in "free defense" costs while coverage issues are being litigated.[13]

In ruling on the "suit" issue, the Court overlooked these important policy considerations and should reconsider its decision.

* * * *

[13] Similarly, with respect to numerous claims that were properly denied by insurers over the years based on *Edgerton*, policyholders now may attempt to use the decision to improperly assert that such denials constitute breaches of contract and/or bad faith.

(4)

Supreme Court, U.S.
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No. 03-1199

IN THE

Supreme Court of the United States

EMPLOYERS INSURANCE COMPANY OF WAUSAU,
Petitioner,

v.

JOHNSON CONTROLS, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

REPLY BRIEF FOR PETITIONER

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Respondent Johnson Controls, Inc. (JCI) presented to the Wisconsin Supreme Court *only* the question whether JCI's liabilities for environmental response costs are "damages" within an insurer's duty to indemnify under a general liability insurance policy. Nothing in JCI's petition for review or briefs on the merits suggested that the court should *also* consider whether a PRP letter is a "suit" within an insurer's separate duty to defend. Yet the Wisconsin Supreme Court decided the "suit" issue without notifying Wausau that the issue was under consideration or affording it an opportunity to be heard on that question.[1] JCI's efforts to obscure matters cannot retroactively alter those historical facts.[2]

Those facts—lack of notice or an opportunity to be heard—establish that Wausau was denied due process. JCI's attempts to avoid that conclusion are based on false premises. JCI overstates the due process principle that Wausau advocates and thus never actually confronts the conduct of the Wisconsin Supreme Court, which did not merely *raise* an argument not presented by the parties, but *sua sponte decided* a matter that was separate and distinct from the issue before it. As this Court and numerous lower courts have recognized, such surprise judicial decisionmaking violates due process. JCI also ignores the direct consequences that adjudication, unlike legislation or agency rulemaking, has on the parties before the court. In this case, the Wisconsin Supreme Court's action will cause substantial pecuniary harm to Wausau. Wausau was therefore entitled to

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[1] The court's opinion recognizes that the two issues are separate. The court addressed them in two separate sections of its opinion, one entitled "Are CERCLA Response Costs Damages?" and the other "Do PRP Letters Trigger the Insurer's Duty to Defend?" *See* Pet. App. 16a, 34a.

[2] Although JCI suggests that a detailed review of the record would be needed to determine what issues were before the Wisconsin Supreme Court (Opp. 12 n.7), JCI itself does not rely on any part of the record not discussed in the petition for certiorari or reprinted in the appendices already before this Court.

the protections of due process—protections that were denied to it.

1. JCI's argument that Wausau was aware that the "suit" issue was presented to the Wisconsin Supreme Court defies reality and common sense. As *amicus curiae* CICLA explains (CICLA Br. 14-15), whether a PRP letter is a "suit" within the duty to defend is of paramount significance to insurers. Unlike the insurer's indemnity obligation, which is typically limited by policy limits, the insurer's defense obligation often is not, and the cost of defending an environmental matter may well meet or exceed the indemnity costs. Thus, the holding in *City of Edgerton* v. *General Casualty Co.*, 517 N.W.2d 463 (Wis. 1994), that a PRP letter is not a "suit" was of immense importance to Wausau and the other insurer parties. Any attempt to seek overruling of *Edgerton*'s "suit" holding would have been opposed at least as vigorously as Wausau opposed JCI's effort to overturn *Edgerton*'s "damages" holding. But even though, according to JCI, this surpassingly important issue was supposedly presented to the Wisconsin Supreme Court for review, neither JCI nor Wausau addressed that issue in the briefs, and the court asked not a single question about it at oral argument.

Stripped to its essence, JCI's position is that it raised the "suit" issue in the question presented in its petition for review and in a few comments by its counsel at oral argument.[3] Neither contention is credible. JCI certainly did not "broadly [seek] review of the continuing viability" of *Edgerton* "without limitation" (Opp. i). Rather, JCI's petition presented a limited issue: "Should [*Edgerton*] be overruled in light of the 'arbitrary' and 'debatable' distinctions it has produced and the discrediting of authorities upon which it re-

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[3] JCI does not deny that the "suit" issue was not decided by the Milwaukee County Circuit Court nor raised in or decided by the Wisconsin Court of Appeals, and that under well-settled Wisconsin practice, Wausau could assume that the "suit" issue would not be decided in the first instance by the Wisconsin Supreme Court. Nor does JCI contest that it did not raise the "suit" issue in its briefs on the merits. *See* Pet. 7-9, 25 n.25.

lied?" Pet. App. 149a-150a. The " 'arbitrary' and 'debatable' distinctions" clearly referred only to *Edgerton*'s "damages" holding. *See* Pet. 6-8.[4] That point was confirmed in the body of JCI's petition, where JCI discussed the "damages" issue at length, but made *no* mention of the "suit" issue. *See* Pet. 9 n.6; Pet. App. 149a-152a.

JCI's assertion that its counsel's brief comments at oral argument—eight sentences of his 30-minute argument—provided Wausau with notice that the "suit" issue was under consideration is equally meritless. First, all of counsel's comments on which JCI relies were made in response to a question from the court *on the "damages" issue.*[5] JCI's counsel understood that the question concerned the "damages" issue, for he reframed it as: "[I]f you . . . were to consider [overruling *Edgerton*] in this case, why would you do it in this case, . . . was *Edgerton* improperly decided, and why am I right that the CERCLA response costs are damages?" In fact, no justice requested that counsel address the "suit" holding of *Edgerton.*

Second, the few remarks of counsel on which JCI relies were made (as JCI acknowledges) in support of its argument that "coverage for environmental liability" (i.e., damages, *not* defense costs) "should not depend upon the existence of

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[4] The reference to "discrediting of authorities upon which [*Edgerton*] relied" also clearly referred to the "damages" holding in *Edgerton.* As explained by the Wisconsin Supreme Court in this case (Pet. App. 33a-34a), two federal court cases on which *Edgerton* had relied in its "damages" holding were subsequently rejected by the highest courts of the states whose laws those courts were applying.

[5] Justice Ann Walsh Bradley stated, "The argument is advanced that this court has provided . . . a workable framework for handling these cases," and then asked, "why, now, in view of uncertainty and confusion that may arise from overruling this, we should do it?" Her reference to the "framework" clearly refers to decisions on the "damages" issue in *Edgerton* and *General Casualty Co.* v. *Hills*, 561 N.W.2d 718 (Wis. 1997), and the four-category "damages" framework of the Wisconsin Court of Appeals in this case. *See* Pet. 6-7. A recording of the oral argument is available at http://www.wicourts.gov/opinions/soralarguments.htm.

a lawsuit." Opp. 6; *see id.* at 5. JCI's position was that Wisconsin "damages" case law was flawed and inconsistent because (under JCI's interpretation) cleanup costs were treated as "damages" if incurred in response to a government lawsuit, but not as "damages" if incurred in response to a PRP letter. Thus, JCI's counsel referred to *Weyerhaeuser Co.* v. *Aetna Casualty & Surety Co.*, 874 P.2d 142 (Wash. 1994), for its holding that costs to comply with state environmental statutes were "damages," even though no written demand (much less any lawsuit) was made against the insured by a government agency. *Weyerhaeuser* did not even address whether a PRP letter is a "suit" within an insurer's defense obligation, and so JCI's citation to it could not have raised the "suit" issue for review. Indeed, JCI's counsel stated that an insurer's defense obligation is "separate from the duty to indemnify," and that "[i]n this case you don't even have to get to the duty to defend." Pet. 10 n.8.[6]

Third, even if JCI's counsel might have *intended* to raise the "suit" issue, as a matter of law, his sparse comments could not have given notice to Wausau that the issue was before the court. Under Wisconsin law, issues may not be raised for the first time at oral argument. *See* Wis. Stat. § 809.62(6); *A.O. Smith Corp.* v. *Allstate Ins. Cos.*, 588 N.W.2d 285, 293 (Wis. Ct. App. 1998). Thus, particularly in light of the absence of any questioning from the court on the

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[6] The other remarks relied on by JCI also were in support of JCI's "damages" argument. JCI's counsel referred to the discussion in *Quaker State Minit-Lube, Inc.* v. *Fireman's Fund Insurance Co.*, 868 F. Supp. 1278 (D. Utah 1994), *aff'd*, 52 F.3d 1522 (10th Cir. 1995), of "the full panoply of harsh things that can happen to somebody who ignores a PRP [letter]" to support JCI's argument that whether response costs are "damages" should not depend on whether there is a lawsuit against the insured. Consistent with oral argument, JCI cited *Quaker State* in its petition for review only for its "damages" holding. JCI's counsel also referred to "[t]he Indiana case, Travelers Indemnity," which he described only as setting forth the terms of an insurer's defense agreement. But no such case was cited in JCI's petition or briefs, and this vague reference could not have raised the "suit" issue for review. *See* Pet. 10 n.8.

"suit" issue, there was no reason for Wausau to think that, contrary to the Wisconsin Supreme Court's own background principle, JCI had raised that issue to the court.

JCI is thus left to argue (Opp. 5-7, 10) that the actions of Wausau's co-respondent, Travelers Indemnity Company, somehow demonstrate that Wausau had notice. This argument is meritless. Travelers' short discussion of the "suit" holding of *Edgerton* merely responded to JCI's argument that "damages" coverage should not depend on the existence of a lawsuit by pointing out that the distinction between a PRP letter and a lawsuit is real and not arbitrary, and indeed was supported by the holding in *Edgerton*, in the context of the duty to defend, that a PRP letter is not a "suit."[7] Travelers was not responding to an argument that the court should overrule its holding that a PRP letter is not a "suit," for JCI had made no such argument.[8]

2. JCI misstates the due process principle that Wausau advocates. Wausau does not contend that courts may

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[7] JCI's conjecture (Opp. 5-6) that Wausau supposedly "allocated briefing responsibility" for the "suit" issue to Travelers is simply false. The three dozen defendant-respondents in the Wisconsin Supreme Court sought additional briefing time to coordinate so that the court would not be inundated with a brief from each party. Nonetheless, there was no "allocat[ion] of briefing responsibility" for specific issues as JCI speculates. This is borne out by the fact that Wausau did not join in Travelers' brief, Travelers did not join in Wausau's brief, and several defendant-respondents joined only in Wausau's brief, but not Travelers'.

[8] JCI's suggestion (Opp. 11 & n.6) that Wausau had a constitutionally adequate opportunity to address the "suit" issue in its motion for reconsideration is baseless. JCI relies on a Wisconsin Supreme Court Internal Operating Procedure that states that the court will grant reconsideration *only* when the court has overlooked legal or factual points. That Internal Operating Procedure—which is not binding on the court, *see* Wis. S. Ct. IOP (Introduction)—plainly does not *require* the court to grant reconsideration *even when* it has committed legal or factual error. Moreover, the court is not obligated to give reasons when denying reconsideration, and it gave none in this case. *See* Pet. App. 147a. The motion for reconsideration was ultimately nothing more than a plea to the court to change its mind—an opportunity that was not a meaningful opportunity to be heard.

not *raise* issues for parties to address. *See* Pet. 26-27. Thus, Justice Scalia's observation in *Davis* v. *United States*, 512 U.S. 452, 464 (1994) (concurring opinion), that the Constitution does not prohibit courts from raising issues not presented by the parties has no bearing here.[9] Wausau also recognizes that courts may in some cases *decide* issues *sua sponte*, particularly where such disposition is logically antecedent to the resolution of a claim the parties have put before the court. *See* Pet. 27-28. But there are limits to that authority, and those limits were transgressed here.

JCI has not pointed to any other case in which an appellate court reached out to decide a matter that was separate and distinct from the claim that the parties had presented and argued to it for resolution. Almost all of the cases JCI cites involved situations where the Court decided a "threshold" issue or question "antecedent" to the claim presented by the parties to the Court for resolution.[10] Such cases are straightforward applications of the principle that "*when an*

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[9] The distinction between raising issues for the parties to address and deciding issues without argument from the parties is demonstrated by *Dickerson* v. *United States*, 530 U.S. 428 (2000), where the Court resolved the issue that the majority declined to consider in *Davis*. In *Dickerson*, although the government declined to argue that a confession obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), could nonetheless be admitted under 18 U.S.C. § 3501, the court of appeals raised that issue and entertained briefing and argument on the issue. *See United States* v. *Dickerson*, 166 F.3d 667, 680 n.14 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000). Similarly, in *Boynton* v. *Virginia*, 364 U.S. 454 (1960) (cited in Opp. 14), although the petition for certiorari presented only constitutional questions for review, the Court questioned the parties in writing about the related statutory issue that it ultimately found dispositive, and the parties briefed that issue. *See Boynton*, Opp. App. 12; Pet. Br. 20-22; Resp. Br. 6-9; U.S. Amicus Br. 5-9.

[10] *E.g.*, *Arcadia, Ohio* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1990); *Teague* v. *Lane*, 489 U.S. 288, 300-301 (1989). Although *United States* v. *IBM Corp.*, 517 U.S. 843, 854-856 (1996), does not fit into this category, that is so only because—quite the opposite of JCI's characterization (Opp. 13-14)—the Court *declined* to overrule its precedent on a ground not advanced by the parties.

issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *United States Nat'l Bank of Ore.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (emphasis added; internal quotation marks and citation omitted).[11] Similarly, in cases such as *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), *Mapp* v. *Ohio*, 367 U.S. 643 (1961), *Batson* v. *Kentucky*, 476 U.S. 79 (1986), and *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), the Court determined that, rather than apply the legal rule invoked by the parties to the claim presented to the Court, it would be more appropriate to reconsider the fundamental soundness of that rule. By contrast, in this case, the Wisconsin Supreme Court reached out to decide an issue that was never argued by the parties *and* was separate and distinct from the claim presented to it.

Moreover, JCI is notably silent about the large and consistent body of case law recognizing the due process principle that a court may not dispose of a party's claims without notice and an opportunity to be heard (*see* Pet. 20-24). Nor does JCI suggest any distinction between the conduct prohibited by that body of law and the Wisconsin Supreme Court's action here. Both involve a court's *sua sponte* resolution of an issue not presented to it, without notice or an

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[11] To similar effect is *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999). In that case, the petition for certiorari presented the following question: "'In what circumstances may punitive damages be awarded under Title VII . . . .'" *Id.* at 540 (quoting Pet. i). Although the parties focused on the evidentiary showing necessary to justify an award of punitive damages, this Court also addressed the proper standard for imputing liability to an employer in the punitive damages context. *Id.* The Court did not reach out to decide a separate claim or create a wholly distinct legal standard. Rather, the Court addressed an issue that was "intimately bound up" with the issue focused on by the parties and logically subsumed within the question presented. *See id.* Moreover, in *Kolstad*, the issue was briefed by *amicus curiae* and argued by the parties. *See id.* at 540-541 (citing briefs and oral argument).

opportunity to be heard, and both constitute a denial of due process.

3. JCI's contention that "[i]t is not a 'due process' violation when a court makes new law, simply because some party who will be adversely affected by the discharge of that function, claims not to have had an opportunity to completely 'brief' the issue" (Opp. 15) turns the Due Process Clause on its head. "[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971).

Officials acting in a *non-adjudicative capacity*, such as legislators and administrators, are not necessarily required to provide notice and an opportunity to be heard to all who may be potentially affected before enacting a rule of general applicability. But due process dictates that *judicial action*, which has a particularized effect on the parties before a court, requires notice and an opportunity to be heard. This distinction is borne out in the very case on which JCI relies (Opp. 15-16), *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445-446 (1915) (distinguishing *Londoner* v. *Denver*, 210 U.S. 373, 385-386 (1908)). And this Court has explicitly required that "deprivation of life, liberty or property *by adjudication* be preceded by notice and opportunity for hearing...." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). Here, Wausau was not a bystander to a generally applicable change in law, but an actual party before the court that was directly affected by its adjudication. Accordingly, the court's failure to provide notice and an opportunity to be heard before deciding the "suit" issue against Wausau both implicated and violated its due process rights.

JCI also fails to distinguish *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930), from this case. In *Brinkerhoff-Faris*, the plaintiff challenged a county's tax assessment as discriminatory. Rather than adjudicating

that discrimination claim on the merits, the Missouri Supreme Court dismissed the claim on a ground neither raised nor argued by the parties—namely, that the plaintiff had not sought relief from the state tax commission, a remedy that had long expired. In so doing, the court overruled its prior holding that the state tax commission lacked authority to hear such claims. *Id.* at 675-677. This Court reversed on due process grounds, explaining:

> Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule [itself]. . . . But, while it is for the state courts to determine the . . . law of the state, they must, in so doing, accord the parties due process of law.

Id. at 681-682 (footnote omitted). This Court was concerned not only with the unavailability of relief from the tax commission, but also with the state court's own failure to hear the claim. Thus, although, as JCI points out (Opp. 16), the Court stated that "if the administrative remedy were still available to the plaintiff, there would be no denial of due process," 281 U.S. at 682 n.9, that point only emphasizes that this Court took issue with the plaintiff's inability to present its claim in *any* forum. In this case, of course, the only possible forum in which Wausau could have presented its substantial arguments against overruling *Edgerton* on the "suit" issue was the Wisconsin Supreme Court. By deciding that issue without giving Wausau notice or an opportunity to be heard, the Wisconsin Supreme Court denied Wausau *any* forum in which to present its claim.

4. JCI errs in its characterization of Wausau's property interest at stake (Opp. 17-19). As a defendant to this suit for monetary relief, Wausau stands to suffer direct and substantial pecuniary harm from the surprise resolution of the "suit" issue. Indeed, even though judgment has not been

entered, Wausau has already offered a defense to JCI, in light of the Wisconsin Supreme Court's disposition of the "suit" issue and the preclusively costly risk that Wausau could be estopped from raising coverage defenses under Wisconsin state law if it failed to provide a defense (Pet. 17-18; CICLA Br. 17-18). Wausau's pecuniary interest is clearly the type of property that requires the protections of due process. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).

Of course, the question here is not whether courts may overrule their precedents establishing rules of liability. Courts plainly have the authority to do so, even if such action adversely affects the litigants' property interests. But precisely because constitutionally protected property interests are implicated in such cases, such judicial action must be accompanied by the basic elements of due process, notice and an opportunity to be heard, no less than when the state revokes a license, terminates welfare benefits, or garnishes wages.[12] Wausau "seeks only the right to contest on the merits" whether JCI's receipt of a PRP letter was a "suit" within Wausau's defense obligation, and "[t]hat right . . . is just what due process affords it." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 472 (2000).

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For the foregoing reasons and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] *Bell* v. *Burson*, 402 U.S. 535 (1971) (driver's license and vehicle registration); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Sniadach* v. *Family Fin. Corp.*, 395 U.S. 337 (1969) (wage garnishment).

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No. 03-1199

In The
Supreme Court of the United States

EMPLOYERS INSURANCE COMPANY OF WAUSAU,

Petitioner,

v.

JOHNSON CONTROLS, INC., *et al.*,

Respondents.

On Petition For A Writ Of *Certiorari* To The Supreme Court Of Wisconsin

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

The Complex Insurance Claims Litigation Association ("CICLA") submits this motion for leave to file an *amicus curiae* brief in support of Petitioner Employers Insurance Company of Wausau ("Wausau") pursuant to Supreme Court Rule 37.2(b). CICLA's *amicus curiae* brief presents relevant information beyond the scope of the submissions by the parties to this case and focuses on the potential significance of this case to numerous others beyond Wausau and the respondents. Through its participation, CICLA seeks to provide "unique information or perspective that can help the court." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see also Miller-Wohl Co. v. Comm'r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) ("the classic role of *amicus curiae* [is to] assist[] in a case of general public interest, supplement[] the efforts of counsel, and draw[] the court's attention to law that escaped consideration").

As required by Supreme Court Rule 37.2(a), CICLA sought the consent of the parties to file this *amicus curiae* brief. Wausau consented to the filing of CICLA's *amicus curiae* brief, as did respondents The Travelers Indemnity Company and Transamerica Premier Insurance Company.[1] This motion is necessary, however, because Respondent Johnson Controls, Inc. ("JCI") withheld its consent to the submission of an *amicus curiae* brief by CICLA.

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[1] The letters from counsel consenting to the filing of this *amicus curiae* brief have been filed in the office of the Clerk.

CICLA is a trade association of major property and casualty insurance carriers. CICLA is vitally interested in this case because its members have underwritten and continue to underwrite a substantial portion of the liability insurance contracts in the State of Wisconsin and nationwide, and because many of its members' liability insurance contracts contain a "suit" provision similar or identical to the one at issue herein. CICLA – and its predecessor the Insurance Environmental Litigation Association – have filed over 600 briefs *amicus curiae* in federal and state courts nationwide. In addition, CICLA participated in this case as an *amicus curiae* before the Wisconsin Supreme Court. CICLA therefore is uniquely situated to assess and explain the potential ramifications of the Wisconsin Supreme Court's decision for insurers throughout the country.[2]

As an association of insurers, CICLA brings special expertise in, and knowledge of, disputes concerning the meaning of the term "suit" in liability insurance contracts and how judicial interpretations of the term affect insurers. Further, as a result of its extensive experience as an advocate for insurers in courts nationwide, CICLA is uniquely qualified to offer a broader perspective than the parties on the ramifications of the Wisconsin Supreme

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[2] CICLA seeks to file this brief on behalf of CICLA member companies Farmers Insurance Group, Royal & SunAlliance, St. Paul Fire & Marine Insurance Company, and Selective Insurance Company of America. CICLA does not appear on behalf of the following members who are or were parties to this case or whose affiliates are or were parties in this case: ACE Group of Insurance and Reinsurance Companies, American International Group Insurance Companies, Chubb & Son – a Division of Federal Insurance Company, Hartford Insurance Group, Liberty Mutual Insurance Company, The Travelers Indemnity Company, and Zurich American Insurance Company.

Court decision in this case, a decision in which the court (1) reached an issue that was *not* presented by the policyholder's appeal; (2) abandoned its own nearly ten-year-old precedent on the meaning of the term "suit"; (3) failed to afford Wausau notice that the court would decide the "suit" issue; and (4) failed to give Wausau any opportunity to be heard on the "suit" issue. As CICLA demonstrates, this Court should grant *certiorari* because the Wisconsin Supreme Court violated Wausau's right to due process by refusing to afford Wausau notice and an opportunity to be heard on the "suit" issue. Moreover, the Wisconsin Supreme Court's conspicuous refusal to hear Wausau's arguments on the "suit" issue resulted in a decision which is extremely prejudicial to Wausau and to all others that insure risks in Wisconsin. CICLA respectfully requests leave of the Court to file the attached *amicus curiae* brief in support of Wausau.

Respectfully submitted,

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BRIEF OF COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted on behalf of the Complex Insurance Claims Litigation Association ("CICLA"). Petitioner Employers Insurance Company of Wausau and Respondents The Travelers Indemnity Company and Transamerica Premier Insurance Company have consented to CICLA's submission of this brief. Respondent Johnson Controls, Inc. has withheld consent. A motion for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2(b) is included with this brief. The letters from counsel for the parties that consented to the filing of this *amicus curiae* brief have been filed in the office of the Clerk.

INTEREST OF *AMICUS CURIAE*[3]

The Complex Insurance Claims Litigation Association ("CICLA") is a trade association of major property and casualty insurance carriers.[4] Since its formation in 1986,

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[3] This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[4] This brief is submitted on behalf of CICLA member companies Farmers Insurance Group, Royal & SunAlliance, St. Paul Fire & Marine Insurance Company, and Selective Insurance Company of America. CICLA does not appear on behalf of the following members who are or were parties to this case or whose affiliates are or were parties in this case: ACE Group of Insurance and Reinsurance Companies, American International Group Insurance Companies, Chubb & Son – a Division of Federal Insurance Company, Hartford Insurance Group, Liberty Mutual Insurance Company, The Travelers Indemnity Company, and Zurich American Insurance Company.

CICLA (formerly known as the Insurance Environmental Litigation Association) has filed more than 600 *amicus curiae* briefs in complex insurance cases. CICLA is vitally interested in this case because its members have underwritten and continue to underwrite a substantial portion of the liability insurance contracts in the State of Wisconsin and nationwide, and because many of its members' liability insurance contracts contain a "suit" provision similar or identical to the one at issue herein.

As an association of insurers, CICLA brings special expertise in, and knowledge of, disputes concerning the meaning of the term "suit" in liability insurance contracts and how judicial interpretations of the term affect insurers. Further, as a result of its extensive experience as an advocate for insurers in courts nationwide, CICLA is uniquely qualified to offer a broader perspective than the parties on the ramifications of the Wisconsin Supreme Court decision in this case, a decision in which the court (1) reached an issue that was *not* presented by the policyholder's appeal; (2) abandoned its own nearly ten-year-old precedent on the meaning of the term "suit"; (3) failed to afford petitioner Employers Insurance of Wausau ("Wausau") notice that the court would decide the "suit" issue; and (4) failed to give Wausau any opportunity to be heard on the "suit" issue. As CICLA demonstrates, the Wisconsin Supreme Court violated Wausau's right to due process by failing to afford Wausau notice and an opportunity to be heard on the "suit" issue. Moreover, the Wisconsin Supreme Court's conspicuous refusal to hear Wausau's arguments on the "suit" issue resulted in a decision which is extremely prejudicial to Wausau and to all others that insure risks in Wisconsin.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* and agree to review the ruling below in order to protect fundamental due process interests and correct a serious prejudice to insurers. This case is not simply a dispute over the meaning of insurance contract terms under state law. To the contrary, it presents fundamental questions of judicial fairness and threatens unjustly to alter insurer rights and expectations.

In its decision giving rise to the instant petition, the Supreme Court of Wisconsin asked and answered two questions involving the interpretation of two separate and distinct terms in a comprehensive general liability insurance policy: (A) "Are CERCLA Response Costs Damages?" (the "damages" question); and (B) "Do PRP Letters Trigger The Insurer's Duty to Defend?" (the "suit" question). *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 665 N.W.2d 257, 270, 281 (Wis. 2003). On both questions the Wisconsin Supreme Court overturned its prior rulings in *City of Edgerton v. General Casualty Company*, 517 N.W.2d 463 (Wis. 1994).

In deciding the "damages" question, the Wisconsin Supreme Court made an unfortunate decision in CICLA's view, but it did so after a full and fair airing of the issue when the question was properly presented to it, and petitioner is not challenging that ruling here. The Wisconsin Supreme Court's decision on the "suit" question, however, was more than just unfortunate – it deprived petitioner of its right to due process under the Fourteenth Amendment, and the violation of petitioner's right was severe enough to warrant intervention by this Court.

The "damages" question had been raised on appeal by Johnson Controls, Inc. ("JCI"); had been addressed by the

trial court and the Wisconsin Court of Appeals; and was the subject of at least ten separate briefs and extensive oral argument to the Wisconsin Supreme Court. Further, in reversing its own prior decision on the meaning of "damages," the Wisconsin Supreme Court articulated in detail its rationale for departing from *stare decisis* on that point. In marked contrast, the "suit" question was *not* presented by JCI's appeal; had *not* been addressed by the trial court or the Wisconsin Court of Appeals; and was *not* briefed or argued to the Wisconsin Supreme Court. Instead, the Wisconsin Supreme Court raised the "suit" question *sua sponte*, without giving petitioner any notice that the court would address the issue. Further, the Wisconsin Supreme Court decided the "suit" question without affording petitioner any opportunity to be heard on the issue – Wausau had not briefed the issue before the decision, and its petition for rehearing, which sought an opportunity to be heard on the "suit" question, was denied without comment. Moreover, with respect to the "suit" issue, the Wisconsin Supreme Court articulated no rationale whatsoever for its departure from *stare decisis*.

Because it deprived Wausau of notice and an opportunity to be heard on the "suit" issue, the Wisconsin Supreme Court did not consider the substantial prejudice that its surprise *sua sponte* decision would cause Wausau and other insurers. While the decision's retroactive effect may be litigated further, insurers covering risks in Wisconsin can now anticipate that policyholders will present claims for millions of dollars incurred to respond to PRP letters over the past ten years – claims that insurers could not have anticipated while *Edgerton* governed the meaning of "suit"

in Wisconsin.[5] In addition, the Wisconsin Supreme Court's decision dramatically expands the scope of a liability insurer's prospective defense obligations in a way that is likely to give policyholders a windfall in the form of a defense against environmental claims that ultimately will prove to be beyond the scope of coverage under their liability insurance contracts.

The Wisconsin Supreme Court's surprise *sua sponte* decision on the "suit" issue is a glaring violation of Wausau's due process rights which will cause substantial harm to Wausau and to other insurers. This Court should grant *certiorari* to correct this due process violation and reaffirm the right of litigants to be heard on issues before they are decided by the judiciary.

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[5] Policyholder advocates have recommended that environmental claims for which insurers denied coverage pursuant to *Edgerton* be resubmitted. *See* David J. Edquist, *Edgerton and Johnson Controls: New Life for Coverage of Old Environmental Liabilities*, von Briesen & Rober, s.c. Environmental Law Bulletin (July 2003), *available at* http://www.vonbriesen.com/resourcelibrary/docs/environmental/environmental_liability_coverage.pdf ("*Johnson Controls* may impact insureds' rights to reimbursement for settlement payments and defense costs incurred in environmental cleanup matters, where claims were previously denied based on the *Edgerton* ruling."); Pete Millard, *Cleanup Ruling Supreme For Business*, The Business Journal of Milwaukee (July 21, 2003), *available at* http://milwaukee.bizjournals.com/milwaukee/stories/2003/07/21/newscolumn1.html ("Environmental lawyers are digging through old files to revive cases for corporate clients. . . . "); Cynthia E. Smith, *Wisconsin Supreme Court Releases Landmark Environmental Insurance Decision Reversing Its 1994 Holdings In Edgerton – You May Now Have Insurance Coverage For Environmental Claims*, Michael Best & Friedrich LLP Land & Resources Alert (July 2003), *available at* http://www.mbf-law.com/pubs/client/LR_alert_7_03.cfm ("Based upon this change in the law, you are encouraged to review your environmental claims history").

ARGUMENT

I. WAUSAU WAS DEPRIVED OF NOTICE AND AN OPPORTUNITY TO BE HEARD ON THE "SUIT" ISSUE AND THUS WAS DENIED DUE PROCESS.

A. The Wisconsin Supreme Court's Ruling In JCI's Favor On An Issue JCI Did Not Raise Undermines Confidence In A Fair And Impartial Judiciary.

As set forth in detail in Wausau's petition, JCI asked the Wisconsin Supreme Court *only* to overrule *Edgerton* on the meaning of the term "damages" and to hold that environmental response costs incurred pursuant to CERCLA qualify as "damages" under a comprehensive general liability insurance policy. JCI did not ask the Wisconsin Supreme Court to address the separate holding in *Edgerton* that only an actual lawsuit – and not a PRP letter – qualifies as a "suit" triggering a liability insurer's duty to defend. Because JCI did not ask that *Edgerton*'s "suit" rule be overturned, Wausau had no warning that it might be necessary to defend *Edgerton*'s rule on that issue. In deciding nonetheless to rule on the "suit" issue and to resolve it in JCI's favor, the Wisconsin Supreme Court departed from due process requirements.

In this case, like any other litigant in this country, Wausau had a fundamental right to expect that the Wisconsin Supreme Court would provide it a full and fair opportunity to be heard on all issues, but instead the court acted precipitously on the "suit" issue. When courts act in this fashion, they undermine what one commentator has identified as "the primary social purpose" of the adversarial judicial process, that is "deciding disputes in a manner that will, upon reflection, permit the loser as well as the winner to feel that he has been fairly treated." George C.

Christie, *Objectivity in the Law*, 78 Yale L.J. 1311, 1329 (1969).

Simply stated, the "suit" issue need not and should not have been reached by the Wisconsin Supreme Court in this case. By reaching out to decide the issue despite JCI's failure to raise it on its own behalf, the Wisconsin Supreme Court erred.

B. There Can Be No Justification For The Wisconsin Supreme Court's Failure To Afford Wausau Notice And An Opportunity To Be Heard On The "Suit" Issue.

As set forth above, the Supreme Court of Wisconsin erred when it reached out to consider an issue never raised by JCI on appeal. The Wisconsin Supreme Court compounded its error by failing to afford Wausau notice or any opportunity to be heard on the "suit" issue. The Wisconsin Supreme Court could have mitigated the injustice done to Wausau: having decided *sua sponte* to address the "suit" issue in addition to the "damages" issue raised by JCI, the Wisconsin Supreme Court could have advised the parties of that decision, thereby giving Wausau the opportunity to place before the court its very substantial arguments on the "suit" issue by addressing them in its briefs and at oral argument. However, the Wisconsin Supreme Court did not request briefing on the "suit" issue, nor did any member of the court question the parties on the issue during oral argument. Wausau literally learned of the Wisconsin Supreme Court's decision to revisit *Edgerton*'s "suit" rule only by reading the Wisconsin Supreme Court's opinion issued on July 11, 2003, without having been afforded any opportunity to be heard on the issue beforehand. Moreover, when Wausau filed a timely motion for rehearing, which pointed out that Wausau had

been deprived of notice and an opportunity to be heard on the "suit" issue, the Wisconsin Supreme Court denied Wausau's motion without explanation. Thus, having deprived Wausau of notice and an opportunity to be heard on the "suit" issue, the Wisconsin Supreme Court also refused the chance to rectify its error.

This Court's precedents make clear that the Wisconsin Supreme Court's failure to provide Wausau with an opportunity to be heard on the "suit" issue deprived Wausau of its Constitutional right to due process. More than seventy years ago this Court considered a case similar to the case at bar in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff-Faris*, a bank had filed a bill in equity to challenge a tax assessment, which was dismissed by a Missouri state trial court. On appeal, the Missouri Supreme Court disagreed with the trial court's grounds for dismissing the bank's bill in equity. However, the Missouri Supreme Court then proceeded, *sua sponte* and without affording the bank notice or an opportunity to be heard, to (a) consider whether the bank should have filed a complaint with the state tax commission; (b) overrule its own six-year-old precedent holding that the state tax commission had no authority to consider such a complaint; and (c) hold that the bank's claim was barred by its failure to make such a complaint to the state tax commission. On *certiorari*, this Court overturned the Missouri Supreme Court's decision on due process grounds. Writing for a unanimous court, Mr. Justice Brandeis stated as follows:

> We are not now concerned with the rights of the plaintiff on the merits . . . or with the accuracy of the state court's construction of the statute in either the Laclede Case or in the case at bar. ***Our present concern is solely with the question whether the plaintiff has been accorded due***

> ***process in the primary sense – whether it has had an opportunity to present its case and be heard in its support.*** Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to reexamine and overrule the Laclede Case. Neither of these matters raises a federal question; neither is subject to our review. But, ***while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law.***

281 U.S. at 681-82 (emphasis added). The *Brinkerhoff-Faris* Court concluded that "the Supreme Court of Missouri must be reversed because it has denied to the plaintiff 'due process of law' – using that term in its primary sense of an opportunity to be heard and to defend its substantive right." *Id.* at 678.

The rule articulated in *Brinkerhoff-Faris* – that a state court may not deprive a litigant of "an opportunity to present its case and be heard in its support" – repeatedly has been reaffirmed by this Court. *See, e.g., Richards v. Jefferson County*, 517 U.S. 793 (1996) (citing *Brinkerhoff-Faris* and holding that the Alabama Supreme Court violated due process when it deprived taxpayers of opportunity to be heard on constitutional challenge to state statute); *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964) (citing *Brinkerhoff-Faris* and holding that the South Carolina Supreme Court violated due process by applying its 1961 construction of a criminal statute to conduct that occurred in 1960 such that defendants lacked notice that conduct would be considered a criminal offense).

In this case Wausau clearly was denied "an opportunity to present its case and be heard in its support" with

regard to the "suit" issue. For this reason, the Wisconsin Supreme Court's decision on the "suit" issue cannot stand.

C. The Wisconsin Supreme Court Failed To Articulate Any Basis For Departing From *Stare Decisis* As To The "Suit" Issue.

The Wisconsin Supreme Court explicitly acknowledged that, under its own jurisprudence, its disagreement with *Edgerton* was not sufficient reason to overrule it, and that "[o]verruling *Edgerton* requires a compelling justification." 665 N.W.2d at 285 (citations omitted). The court further stated that a decision to depart from precedent "must be explained carefully and fully to insure that the court is not acting in an arbitrary or capricious manner." *Id.* at 285 (citation omitted). Nevertheless, the Wisconsin Supreme Court provided no explanation whatsoever of its decision to overrule *Edgerton* on the "suit" issue.

The Wisconsin Supreme Court concluded that it was justified in overruling *Edgerton* because it believed that *Edgerton* was fundamentally irreconcilable with its subsequent decision in *General Casualty Co. v. Hills*, 561 N.W.2d 718 (Wis. 1997), such that the efforts of lower courts in Wisconsin to adhere to both *Edgerton* and *Hills* resulted in "arbitrary and illogical distinctions." 665 N.W.2d at 289. Importantly, however, the issue on which *Hills* diverged from *Edgerton* – and created what the Wisconsin Supreme Court in this case viewed as an irreconcilable conflict – was the issue of whether environmental response costs under CERCLA can ever qualify as "damages." *Hills* did not address the separate issue of whether a PRP letter – as distinguished from a lawsuit – implicates a liability insurer's duty to defend. Instead, *Hills* left completely intact and unqualified the bright-line rule of *Edgerton* that a liability insurer's duty to defend

extends only to a "suit" and not to a PRP letter. Thus, the perceived incongruity between *Edgerton* and *Hills*, on which the Wisconsin Supreme Court relied to justify overruling *Edgerton* on the "damages" issue, simply has no application whatsoever to the "suit" issue. Indeed, because *Edgerton* adopted a bright-line rule on the "suit" issue, there can be no suggestion that it has generated any confusion at all on the part of the Wisconsin courts tasked with applying it.

The Wisconsin Supreme Court recognized that the difficulty in applying *Edgerton* and *Hills* involved the "damages" issue alone:

> By overruling *Edgerton's* conclusion on the "as damages" language and adopting the *Hills* rationale, we will rectify the present confusion and arbitrariness surrounding CERCLA cost recovery actions in Wisconsin, while heading off some of the troubling issues still on the horizon. The resulting rule should be clear, comprehensive, and logical: The liability imposed under CERCLA against an insured who has contributed to the contamination of property is covered "as damages" if the costs to satisfy that liability are expended to remediate, or pay for the remediation of, the damaged property, provided that the costs are not excluded by some other provision of the policy.

665 N.W.2d at 292.

The Wisconsin Supreme Court may have assumed implicitly that its abandonment of the *Edgerton* rule on "damages" was reason enough to jettison *Edgerton*'s "suit" rule as well. To the extent the court made such an assumption, Wausau should have been given the chance to debunk it. As Wausau demonstrates (*Cert.* Pet. at 16, n. 14), courts in a number of jurisdictions have held that environmental cleanup costs qualify as "damages" but nonetheless have recognized that a PRP letter is not a

"suit" triggering an insurer's duty to defend. Indeed, the California Supreme Court considered and explicitly rejected the argument that if cleanup costs are "damages," PRP letters must be "suits." *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 959 P.2d 265, 283-284 (Cal. 1998) (rejecting policyholder's contention that "[t]he conclusion that coercive administrative actions are 'suits' flows naturally from this Court's holding in *AIU*[6] that costs incurred to comply with an injunction mandating cleanup or to reimburse a government agency for cleanup expenses . . . constitute 'damages' under a CGL policy.")

The Wisconsin Supreme Court not only failed to offer a "compelling justification" for overruling *Edgerton* on the "suit" issue – it offered no justification at all. Moreover, as Petitioner has amply demonstrated (*see Cert.* Pet. at 15-18), there are many powerful arguments militating in favor of adhering to *stare decisis* on the "suit" issue – arguments the Wisconsin Supreme Court never considered because it refused to hear them, in violation of Wausau's due process rights.

II. THE SUPREME COURT OF WISCONSIN'S SURPRISE *SUA SPONTE* 180-DEGREE TURN ON THE "SUIT" ISSUE IS PROFOUNDLY PREJUDICIAL TO INSURERS.

A. The Wisconsin Supreme Court Erroneously Concluded That Overruling *Edgerton* Would Not Harm Any Significant Interest Of Insurers.

In deciding that departure from *stare decisis* to overrule *Edgerton* was justified, the Wisconsin Supreme

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[6] *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253 (Cal. 1990)

Court expressly determined that doing so would not harm any "significant" interests of insurers. 665 N.W.2d at 294. Because the "suit" issue had not been presented to the Court by the policyholder's appeal, and because the Court had not advised the parties of its intention to consider the "suit" issue, the Court made its determination in this regard without the benefit of any evidence whatsoever concerning what impact a reversal on the "suit" issue actually could be expected to have on insurers. In the absence of any evidence, the Court determined:

(a) that insurers' reliance on *Edgerton* could be relevant for *stare decisis* purposes only if it affected "how insurance contracts have been drafted and bargained for";

(b) that insurers' and insureds' reliance on *Edgerton* in "assess[ing] their respective expected costs and obligations [] and [] account[ing] accordingly" was mere "ancillary reliance" that is *not* relevant for stare decisis purposes; and

(c) that the insurers thus had no reliance interests worthy of protection because most liability insurance contracts issued since 1985 have contained absolute pollution exclusions that would bar coverage for CERCLA-related liabilities.

665 N.W.2d at 294. In the Wisconsin Supreme Court's own words:

> Because the meaning of insurance contract terms should remain settled whenever possible, we are generally disinclined to reverse prior interpretations of these terms.
>
> However, the CGL's treatment of CERCLA claims presents unusual, if not unique, policy construction problems, which justify this court's deviation from general principle. Most, if not all,

> CGL policies executed today will not be governed by either this decision *or* by *Edgerton*. The CGL policy language at issue in this case was drafted long ago and has since been rendered largely inapplicable in the context of CERCLA actions. Beginning in 1985, insurance companies revised their standardized CGL policies to include absolute pollution exclusions from coverage. [] The CGL policies given effect in this case are no longer being marketed, *nor were they at any time after Edgerton*. Therefore, the insurers cannot credibly argue that *Edgerton* established significant reliance interests, in terms of how insurance contracts have been drafted and bargained for, that will be harmed by its reversal.

665 N.W.2d at 293-294 (emphasis in original). By casting the reliance issue in these terms, the Court overlooked (1) the very real extent to which current environmental cleanup litigation arises from conduct many years or even decades ago and thus still potentially implicates pre-1985 liability insurance contracts that lack absolute pollution exclusions; (2) the substantial magnitude of costs that may be claimed for responding to environmental cleanup demands, which policyholders in the absence of *Edgerton* now will characterize as costs of defending a "suit"; (3) the fact that most liability insurance contracts do not have a limit of liability applicable to defense costs, such that expanding the definition of "suit" to include PRP letters will increase a liability insurer's potential defense cost liability exponentially; and (4) the fact that creating insurance coverage where none existed under *Edgerton* will require higher premiums from Wisconsin policyholders so that insurers will have funds to pay for the unforeseen liabilities.

Simply stated, the Wisconsin Supreme Court was wrong to conclude that because post-1985 policies have

absolute pollution exclusions, reversing *Edgerton*'s "suit" rule could inflict no significant harm on insurers. The Wisconsin Supreme Court's erroneous conclusion was the direct result of its reaching out to decide an issue not presented on appeal, failing to give notice of its intention to address the "suit" issue, and failing to afford petitioner any opportunity to be heard on the issue.

B. The Wisconsin Supreme Court Made Unsupported Determinations Concerning Purported "Practical Difficulties" Posed By *Edgerton*'s "Suit" Rule And Ignored Real Practical Difficulties Overruling *Edgerton* Will Cause For Insurers.

The Wisconsin Supreme Court opined that "[a] literal definition of the term 'suit' in the CGL policy presents some practical difficulties in understanding and reconciling the obligations of the parties in the presence of a CERCLA claim." 665 N.W.2d at 282. As there was no evidentiary record concerning the "practical" implications of the "suit" rule established by *Edgerton*, the "practical difficulties" identified by the Wisconsin Supreme Court were devoid of factual support and highly dubious. Moreover, because it failed to afford Wausau any opportunity to be heard on the "suit" issue, the Wisconsin Supreme Court overlooked the very real – and very costly – practical difficulties insurers face when the duty to defend is expanded to encompass not only "suits" but PRP letters as well.

Central to the Wisconsin Supreme Court's conclusion that insurers should be required to defend against PRP letters as well as "suits" was its determination – based on no evidence whatsoever – that PRP letters are "more analogous to a civil complaint than a traditional demand

letter." 665 N.W.2d at 284. In reality, however, a PRP letter differs vastly from a complaint in terms of providing the information an insurance carrier needs in order to determine whether it has any duty to defend. In Wisconsin, as in most states, the existence of a duty to defend is determined by comparing the terms of the insurance contract to the allegations of the complaint. *See, e.g., Grieb v. Citizens Cas. Co.*, 148 N.W.2d 103, 106 (Wis. 1967) ("the insurer is under an obligation to defend only if it could be held bound to indemnify the insured, assuming that the injured person proved the allegations of the complaint" (quoting 29A Am. Jur. *Insurance* § 1452, at 562)). Unlike complaints, however, PRP letters generally do not include the sort of details that would permit an insurer to determine whether coverage under its liability insurance contract potentially is implicated, *e.g.*, how and when the environmental contamination occurred. Indeed, the Illinois Supreme Court, in concluding that only "an action in a court of law" qualifies as a "suit," relied explicitly on the fact that an insurer must analyze the allegations of a "complaint" to determine whether it has any defense obligation:

> The definition of the word "suit" as requiring an action in a court of law is further supported by analyzing the connection between the filing of a complaint and the duty to defend. Whether an insurer's duty to defend has arisen is determined by looking to the allegations in the underlying complaint and comparing these allegations to the policy provisions. If the facts alleged in the underlying complaint fall within or even potentially within policy coverage, the insurer has a duty to defend its insured against the complaint. Thus, the duty to defend extends only to suits and not to allegations, accusations or claims which have not been embodied within

> the context of a complaint. In the instant case [where the policyholder had received a PRP letter], a complaint alleging liability for property damage has never been filed against Lapham-Hickey. Without a complaint, there is no "suit." And without a "suit," Protection's duty to defend Lapham-Hickey is not triggered.

Lapham-Hickey Steel Corp. v. Prot. Mut. Ins. Co., 655 N.E.2d 842, 846 (Ill. 1995) (citing *United States Fid. & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 930 (Ill. 1991).

The lack of specific details in a PRP letter leaves the insurer in a quandary if a PRP letter is deemed to be a "suit," or the "functional equivalent" thereof, giving rise to a duty to defend. As the Wisconsin Supreme Court observed in this case, when an insurer is assessing the existence of a defense obligation, "[i]f there is any doubt about the duty to defend, it must be resolved in favor of the insured." 665 N.W.2d at 283 (quoting *Towne Realty, Inc. v. Zurich Ins. Co.*, 548 N.W.2d 64, 67 (Wis. 1996)). If a PRP letter qualifies as a "suit," and the letter is silent as to how contamination occurred, or whether any "property damage" took place within the policy period of the insurer's policy, the policyholder can be expected to argue that the PRP letter leaves doubt which must be resolved in favor of a duty to defend. If Wisconsin courts accept this policyholder argument, a liability insurer's defense obligation often will extend to environmental claims which, once the relevant facts became available, will prove never to have presented any potential for coverage under the insurer's policy.

The risk that equating a PRP letter with a "suit" will give policyholders a windfall in the form of a defense against claims not potentially covered under their policies is particularly acute in Wisconsin. As noted in Wausau's

petition, under Wisconsin law an insurer from whom a defense is requested risks being estopped to raise coverage defenses unless it either provides the requested defense or intervenes in the underlying action to seek a stay pending a declaratory judgment on the existence of coverage. Wausau *Cert.* Pet. at 17-18 (citing *Newhouse v. Citizens Sec. Mut. Ins. Co.*, 501 N.W.2d 1 (Wis. 1993) and *Mowry v. Badger State Mut. Cas. Co.*, 385 N.W.2d 171 (Wis. 1986)). Unlike an underlying lawsuit, however, a PRP letter is not something in which an insurer can intervene to seek a stay.

This problem disappears if a PRP letter is treated as a "claim" rather than as a "suit," because the CGL policy language at issue here draws a clear distinction between the two: the insurer "shall have the right and duty to defend any suit," whereas the insurer "*may* make such investigation and settlement of any claim or suit as it deems expedient." When a PRP letter received by a policyholder alleges liability for environmental cleanup costs that qualify as "damages" under governing law, an insurer has every incentive to investigate the "claim" asserted in the PRP letter, and to involve itself in the defense and possible settlement of that "claim" *if its investigation discloses that the claim is potentially covered under its insurance policy. See Foster-Gardner*, 959 P.2d at 283 (noting that where insurers ultimately will have indemnity obligations arising from administrative proceedings, "insurers have an inherent incentive to participate in those proceedings where the costs are ascertained.") Stated another way, where a PRP letter is treated as a "claim" seeking "damages," it is likely that the insurer will choose to assist in the defense of the claim *if* it is potentially covered. If, however, a PRP letter is treated as a "suit," it is extremely likely that the insurer will have no choice but to defend *whether or not* the claim is potentially

covered. Under the latter scenario – *i.e.*, the scenario created by the Wisconsin Supreme Court decision at issue here – the insurer will either (a) bear the cost of defending non-covered claims for which it never collected any premium; or (b) to the extent permitted by Wisconsin law, initiate litigation against the policyholder seeking to recoup defense costs paid for environmental claims which ultimately prove never to have been potentially covered under its policies. *See, e.g., Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997). Neither is an efficient result.

Equating a PRP letter with a "suit" triggering the duty to defend creates other practical difficulties for insurers as well. As pointed out by Wausau (*Cert.* Pet. at 18), requiring insurers to defend against PRP letters will increase disputes and litigation between insurers and policyholders over the characterization of remedial investigation costs. Once policyholders have succeeded in expanding the definition of "suit" to include a PRP letter, their next objective will be expanding the definition of "defense costs" to include amounts spent on remedial investigation, so that their ability to recover such amounts from insurers will be unconstrained by any applicable policy limit. Moreover, because there are so many types of PRP letters, with some being "coercive" and others much less so, the Wisconsin Supreme Court's ruling in this case may not be the last word on whether every PRP letter rises to the level of a "suit." Courts in some jurisdictions have adopted a "hybrid" approach and ruled that whether a particular PRP letter constitutes a "suit" depends on the degree of "coerciveness," such that a state environmental agency's mere "invitation to voluntary action" would *not* be a "suit." *See, e.g., Ryan v. Royal Ins. Co.*, 916 F.2d 731, 741-742 (1st Cir. 1990).

The Wisconsin Supreme Court's decision here, which abandons the bright-line "suit" rule of *Edgerton*, will

increase litigation and generate exactly the sort of uncertainty and confusion among lower courts in Wisconsin that the court sought to avoid by overruling *Edgerton*'s "damages" rule. *See Foster-Gardner*, 959 P.2d at 286 (concluding that equating PRP letters with "suits" would "open the flood gates of litigation by inviting, and requiring, a case-by-case determination whether each new and different letter presenting the claim of an administrative agency is to be deemed the 'functional equivalent of a suit brought in a court of law.'") (internal quotation omitted).

For all of these reasons, the Wisconsin Supreme Court's decision causes severe prejudice to insurers, in ways the court almost certainly never contemplated. The court's failure to foresee the prejudice caused by its ruling is the direct result of its failure to afford Wausau notice and an opportunity to be heard on the "suit" issue, which deprived Wausau of due process.

CONCLUSION

The Wisconsin Supreme Court's surprise *sua sponte* decision on the "suit" issue clearly violated Wausau's due process rights, and that decision is highly prejudicial to Wausau and to insurers generally. The petition for *certiorari* should be granted.

Respectfully submitted,

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